Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decision

19 CFR Part 101

(T.D. 87–28)

CHANGE TO THE CUSTOMS SERVICE FIELD ORGANIZATION: GREEN COVE SPRINGS, FLORIDA

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by designating, on a permanent basis, Green Cove Springs, Florida, as a Customs station. Green Cove Springs was designated a Customs station on a temporary basis in 1984. Due to an increasing workload at the station, it now warrants permanent status. This action continues Customs nationwide effort to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the public.

EFFECTIVE DATE: This designation is effective retroactively to October 9, 1986. The regulations are amended as of March 9, 1987.

FOR FURTHER INFORMATION CONTACT: Denise Crawford, Office of Inspection and Control (202–566–9425).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Customs ports of entry and stations are locations where Customs officers are placed for the purpose of accepting the entry of merchandise, collecting duties, examining baggage, clearing passengers, and enforcing the various provisions of the customs laws and other laws.

The significant difference between ports of entry and stations is that at stations, the Federal Government is reimbursed for:

(1) The salaries and expenses of its officers or employees for services rendered in connection with the entry or clearance of vessels; and

(2) Except as otherwise provided by the Customs Regulations, the expenses (including any per diem allowed in lieu of subsistence), but

not the salaries of its officers or employees, for service rendered in connection with the entry or delivery of merchandise.

The list of designated Customs stations is set forth in § 101.4(c), Customs Regulations (19 CFR 101.4(c)).

As part of Customs continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the public, on November 19, 1984, Green Cove Springs, Florida, was designated as a temporary Customs station in accordance with § 101.4(d), Customs Regulations (19 CFR 101.4(d)). Subsequent to that designation, increasing requests for Customs services have been experienced at that location, and the Southeast Regional Commissioner of Customs believes permanent station status is warranted. Since staffing is readily available and the cost of service provided is reimbursable, it will not impose any budget burden. Therefore, the designation of Green Cove Springs, Florida, as a Customs station is being made permanent, effective retroactively to October 9, 1986. The station is supervised by the Jacksonville, Florida, port of entry within the Tampa, Florida, district.

By T.D. 77-241, published in the Federal Register on October 12, 1977 (42 FR 54937), the list of the Customs field organization set forth in Part 101, Customs Regulations (19 CFR Part 101), was extensively revised. The Customs stations designated by the Commissioner of Customs were set forth in § 101.4(c) together with the Customs districts within which they are located and the ports of entry having supervision over the Customs stations. This list has been amended numerous times since it was revised in 1977.

To reflect the designation of Green Cove Springs as a permanent station, this document further amends the list in § 101.4(c) by adding "Green Cove Springs, Fla.", under the column headed "Customs stations" and by adding "Tampa, Fla.," and "Jacksonville" under the columns headed "District" and "Port of entry having supervision", respectively.

As part of this regulatory project, it has been determined that several of the stations listed in § 101.4(c) contain printing errors either in the district or port of entry having supervision. To avoid any confusion, this document also corrects those errors.

List of Subjects in 19 CFR Part 101

Customs duties and inspection, Imports, Organization and functions (Government agencies).

Amendments to the Regulations

PART 101—GENERAL PROVISIONS

1. The authority citation for Part 101, Customs Regulations (19 CFR Part 101), continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 1, 66, 1202 (Gen. Hdnote 11), 1624; Reorganization Plan 1 of 1965, 3 CFR 1965 Supp.

2. To reflect the designation of Green Cove Springs, Florida, as a Customs station, the list of stations in § 101.4(c) is amended by inserting "Tampa, Fla." directly below "Miami. Fla." in the column headed "District", by inserting "Green Cove Springs, Fla." directly below "Fort Pierce, Fla." in the column headed "Customs stations" and by inserting "Jacksonville" directly below "West Palm Beach" in the column headed "Port of entry having supervision."

3. To correct printing errors in th list of stations, § 101.4(c) is further amended in the following manner:

(a) Under the column headed "Port of entry having supervision", the words "Del Rio", appearing directly below Morgan City" are removed.

(b) The listing for the Dallas/Fort Worth, Texas, and Laredo, Texas, stations is revised to read as follows:

District	*Customs stations*	*Port of entry having supervision*
Dallas/Fort Worth, Tex.	Muskogee, Okla.	Tulsa.
Laredo, Tex.	Amistad Dam, Tex.	Del Rio.
	Falcon Dam, Tex.	Roma.
	Los Ebanos, Tex.	Rio Grande City.

(c) Under the column headed "Customs stations" and "Port of entry having supervision", the second listing for "Tucson, Ariz." and "Do.", respectively, are removed.

(d) The listing for the Great Falls, Montana, stations is revised to read as follows:

District	*Customs stations*	*Port of entry having supervision*
Great Falls, Mont.	Colorado Springs, Colo.	Denver
	Wild Horse, Mont.	Great Falls
	Willow Creek, Mont.	Do.

Executive Order 12291 and Regulatory Flexibility Act

Because this amendment is not a "major rule" within the criteria provided in § 1(b) of E.O. 12291, a regulatory impact analysis is not required. Further, because notice and public procedure are not required, this document is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Customs routinely establishes Customs stations througout the U.S. to accommodate the volume of Customs-related activity in various parts of the country. Although this amendment may have a limited effect upon some small entities in the area affected, it is not expected to be significant because establishing stations in other areas has not had a significant economic impact upon a substantial number of small entities to the extent contemplated by the Act. Nor is it expected to impose, or

otherwise cause, a significant increase in the reporting, recordkeeping, or other compliance burdens on a substantial number of small entities.

NOTICE, PUBLIC COMMENT, AND DELAYED EFFECTIVE DATE

Because the amendment relating to Green Cove Springs, Florida, is a change in agency organization, pursuant to 5 U.S.C. 553(b)(B), notice and public comment are unnecessary. Also, because this amendment merely updates the Customs Regulations to reflect Customs current field organization, pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

DRAFTING INFORMATION

The principal author of this document was John E. Doyle, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: February 25, 1987.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, March 9, 1987 (52 FR 7124)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 86–1526)

HERAEUS AMERSIL, INC., APPELLANT *v.* UNITED STATES, APPELLEE

Richard C. King, Fitch, King and Caffentzis, of New York, New York, argued for appellant.

Barbara M. Epstein, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for appellee. With her on the brief were *Richard K. Willard*, Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office.

Appealed from: U.S. Court of International Trade.
Judge CARMAN.

(Appeal No. 86–1526)

HERAEUS AMERSIL, INC., APPELLANT *v.* UNITED STATES, APPELLEE.

(Decided February 26, 1987)

Before MARKEY, *Chief Judge*, RICH, AND SMITH, *Circuit Judges*.

RICH, *Circuit Judge*.

This appeal presents the question whether the Court of International Trade correctly held that Heraeus Amersil's (Heraeus) imported "bell jars" were properly classified by Customs under item 548.05 of the Tariff Schedules of the United States (TSUS) as "Articles not specially provided for, of glass: Other" or should be classified, as urged by Heraeus below and on appeal, under item 548.01 TSUS as "Tubes and tubing with ends processed: Containing over 95 percent silica by weight * * *." We affirm.

The parties stipulated that these articles are invoiced as "Rotosil tubes" with one end hemispherically closed, or as bell jars, and are not "tubing," as distinguished from "tubes." These bell jars are large and cylindrical, made of fused silica, have one end closed in approximately hemispherical shape and the other end open. They have a sandy textured exterior surface and a smooth, glossy interior surface. These articles are up to 36 inches in diameter, 94 inches in height, and have wall thicknesses from ⅜ to ¾ inches. At trial, the

judge saw a sample of one of the articles having an 11-inch diameter, and a 20-inch height, and a ⅜-inch wall thickness.

The judge held that Heraeus did not overcome the presumption that the government's classification is correct by showing that the imported merchandise is more specifically provided for as tubes under item 548.01 than as tubes, "Other" in item 548.05. We *affirm* on the basis of Judge Carman's thorough March 26, 1986, opinion. Like the court below, we do not find the cases cited by appellant to be controlling or persuasive.

AFFIRMED

(Appeal No. 86–1650)

DONNA KELLEY, ET AL., APPELLANTS *v.* SECRETARY, U.S. DEPARTMENT OF LABOR, APPELLEE

Donna Kelley, of Tallapoosa, Georgia, submitted Pro Se.

Richard K. Willard, Assistant Attorney General, *David M. Cohen*, Director, *Velta A. Melnbrences*, Assistant Director and *Platte B. Moring, III*, Commercial Litigation Branch, Department of Justice, of Washington, D.C., submitted for respondent.

Appealed from: U.S. Court of International Trade.
Judge RESTANI.

(Appeal No. 86–1650)

DONNA KELLEY, ET. AL., APPELLANTS *v.* SECRETARY, U.S. DEPARTMENT OF LABOR, APPELLEE

(Decided February 26, 1987)

Before NIES, BISSELL, and ARCHER, *Circuit Judges.*

NIES, *Circuit Judge.*

Donna Kelley, on behalf of herself and other former employees of the American Thread Company, appeals from the decision of the Court of International Trade, 638 F. Supp. 1344 (CIT 1986), which affirmed the Secretary of Labor's denial of a petition for trade adjustment assistance under section 222 of the Trade Act of 1974, 19 U.S.C. § 2272 (1982 & Supp. III 1984). Appellants, in essence, challenge the court's holding that substantial evidence supports the Secretary's determination. In addition to countering appellants' arguments, the government urges that the trial court erred in holding, in an earlier decision, that appellants' petition was timely filed in that court. 626 F. Supp. 398, 400 (CIT 1986). We agree with the government. Accordingly, we reverse the trial court's holding that it had jurisdiction, vacate the appealed judgment, and remand with

the direction to dismiss the subject petition for lack of jurisdiction due to the untimely filing of the complaint.[1]

BACKGROUND

On January 4, 1985, the Office of Trade Adjustment Assistance of the Department of Labor published a negative determination regarding the eligibility of the former employees of American Thread to apply for worker adjustment assistance. The Secretary of Labor found that increases in importation of articles like or directly competitive with articles produced by American Thread did not contribute importantly to the loss of their jobs. 50 Fed. Reg. 569 (1985). The trial court found that there was no evidence that Ms. Kelley or the workers who had actually petitioned the Labor Department had received actual notice of the negative determination earlier than February 18, 1985. On March 20, 1985, Ms. Kelley wrote to the Clerk of the Court of International Trade and to the Secretary of Labor objecting to the unfavorable determination and asking for various kinds of financial assistance. The Clerk deemed the letter to the court to constitute a summons and complaint filed on March 28, 1985, the date of its receipt.

To obtain judicial review of a final determination of the Secretary of Labor under the Trade Act of 1974 with respect to the eligibility of workers to apply for trade adjustment assistance, "[a] worker, group of workers, certified or recognized union, or authorized representative of such worker or group" must, "within sixty days after notice of such determination commence a civil action in the United States Court of International Trade for review of such determination." 19 U.S.C. § 2395(a) (1982). The Secretary of Labor is required by statute, 19 U.S.C. § 2273(c) (1982), to publish its final determination in the Federal Register. Under the Secretary's regulations interpreting section 2395(a), "[t]he party seeking judicial review must file for review in the appropriate court within sixty (60) days after the notice of determination has been published in the Federal Register." 29 C.F.R. § 90.19(a). Ms. Kelley did not file within the sixty days of publication of notice in the Federal Register, but did file within sixty days of receiving actual notice.

The court agreed with the government that constructive notice, i.e. by publication, was generally sufficient under 19 U.S.C. § 2395(a) to start the running of the sixty-day period, but held that such notice was not effective against the *pro se* appellants in this case. The court reasoned that "the statute requires a consideration of whether notice was proper in the context of other applicable statutes and regulations." 626 F. Supp. at 399. The "other applicable statute" relied on by the court was 19 U.S.C. § 2273(a), which requires the Secretary of Labor to act on a petition for trade adjustment assistance within sixty days after the petition is filed. In this case the Secretary did not meet the deadline. As a consequence, the

[1] We do not address the issue of Ms. Kelley's standing to sue "on behalf of" other workers.

court held that the Secretary's late action on the petition, while not *ultra vires,* had procedural consequences. It reasoned that:

> where, as here, a party is proceeding *pro se* before the Secretary of Labor, the court finds that the Secretary's failure to comply with the statutory time constraints regarding issuance of a final determination makes it inappropriate to hold that publication in the Federal Register places plaintiffs on constructive notice and thereby marks the beginning of the sixty day statute of limitations. Congress could not have intended a *pro se* party to constantly search the Federal Register for the final determination of the Secretary of Labor for months beyond the sixty days within which such determination is due under the statute.

626 F. Supp. at 400.[2] The court held that the sixty-day period began to run in this case from the actual notice date, that is, February 18, 1985.

OPINION

A reviewing court must accord substantial weight to an agency's interpretation of a statute it administers. *Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 450 (1978); *American Lamb Co.* v. *United States,* 785 F.2d 994, 1001 (Fed. Cir. 1986). There is no hint in the Trade Act that actual notice is necessary to start the sixty-day limitation period, and utilization of notice in the Federal Register as the triggering event is consistent with the language and structure of the Act. "Though a court may reject an agency interpretation that contravenes clearly discernible legislative intent, its role when that intent is not contravened is to determine whether the agency's interpretation is 'sufficiently reasonable.'" *American Lamb,* 785 F.2d at 1001; *see also United States* v. *Federal Ins. Co.,* 805 F.2d 1012, 1017 (Fed. Cir. 1986). "[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984); *Federal Ins. Co.,* 805 F.2d at 1017.

Here, the trial court acknowledged that the Secretary's interpretation of section 2395(a) is reasonable, but made an exception for *pro se* litigants. We agree that leniency with respect to mere formalities should be extended to a *pro se* party, as was done in this case by the acceptance of Ms. Kelley's letter as a "summons and complaint." However, where the question is the calculation of the time limitations placed on the consent of the United States to suit, a court may not similarly take a liberal view of that jurisdictional requirement and set a different rule for *pro se* litigants only. On a matter of that nature we are aware of no authority which would

[2] The court distinguished other cases upholding the Secretary's interpretation of section 2395(a), namely, *Waschko* v. *Donovan,* 4 CIT 271, 272 (1982), on the ground that the Secretary made the determination in that case within the statutorily prescribed time limit, and *Brunelle* v. *Donovan,* 3 CIT 76 (1982), which involved both a late agency determination and a *pro se* petitioner, because it did not specifically address the procedural consequence of a late determination by the Secretary.

support that type of differentiation between litigants. Moreover, contrary to the trial court, the lack of specificity in the statute with respect to the notice requirement does not evidence that Congress intended the result the court reached. Nor does it open the way for the court to overturn the Secretary's regulation as unreasonable. The *pro se* status of appellants does not remove them from the general rule on constructive notice, 29 C.F.R. § 90.19(a).[3]

Because appellants have failed "to comply with the terms upon which the United States has consented to be sued, the court has no 'jurisdiction to entertain the suit.' " *Georgetown Steel Corp.* v. *United States*, 801 F.2d 1308, 1312 (Fed. Cir. 1986). Accordingly, we vacate the judgment of the Court of International Trade and remand the case to that court to dismiss the appellants' petition for lack of jurisdiction.

REVERSED, VACATED, AND REMANDED

[3] The trial court did not rest its decision on the possible failure of the Secretary of Labor here to follow a regulation which states that the Secretary will give "notice of a certification, negative determination, or termination" to the "group of workers concerned," presumably via their designated representative. 29 C.F.R. § 90.34. The Secretary gave notice to the company's personnel officer. The government asserts and the Court of International Trade has held, *Tyler* v. *Donovan*, 535 F. Supp. 691, 694 (CIT 1982), that the "notice" of 29 C.F.R. § 90.34 is simply a courtesy notice and that the Secretary's interpretation specifically with respect to the time for seeking judicial review in 29 C.F.R. § 90.19(a) controls. We are constrained to agree, but without approving notice to a personnel officer as notice to the group of workers concerned.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 87–12)

GELMART INDUSTRIES INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83–3–00383

Before TSOUCALAS, *Judge.*

[Judgment in part for plaintiff; judgment in part for defendant.]

(Decided February 3, 1987)

Mandel & Grunfeld (Steven P. Florsheim) for the plaintiff.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice *(Paula N. Rubin)* for the defendant.

OPINION AND ORDER

TSOUCALAS, *Judge:* Plaintiff challenges the classification of seven different styles of brassieres[1] each containing some element of lace. The merchandise, exported from the Philippines, and entered through the Port of New York in 1981, was classified by Customs under item 376.24, TSUS:

> Corsets, girdles, brassieres, and similar body-supporting garments for women and girls; * * * all the foregoing of any materials:
>
> Lace or net articles, whether or not ornamented, and other articles, ornamented .....32% ad val.

Defendant contends style nos. 3511, 3590, 3665 (Plaintiff's Exhibits 1–3) are lace articles; and style nos. 3032, 3364, 3703 and 3952 (Plaintiff's Exhibits 5–8), are ornamented. Plaintiff alleges that the brassieres in issue are neither lace nor ornamented, and should be classified under item 376.28, TSUS:

> Corsets, girdles, brassieres, etc.
>
> Other articles, not ornamented .....18% ad val.

[1] Originally, plaintiff also contested the classification of an eighth model, #3892 (Plaintiff's Exhibit 4). However, before trial, defendant conceded that the proper classification was under item 376.28 as claimed by plaintiff, and consented to judgment in plaintiff's favor.

At trial, the lone witness, presented by plaintiff, was Mr. Sumner Spivak, associated with Gelmart Industries brassiere department for 20 years. As Coordinator of Corporate Affairs, Mr. Spivak participates in, and coordinates, the design, production, sales, marketing and import of plaintiff's brassieres. His experience includes working with 1,000 different models of brassieres over the years. He testified as to the different types of brassiere construction, which include: strapless, full figure, contour, molded, seamcups and stretch. Tr. at 14. The materials used in brassiere construction include polyester cotton, lace, tricot, Simplex; and in marketing, brassieres are categorized by material: lace, tricot, or Simplex. Tr. at 14.

A sample of each brassiere style in issue was introduced into evidence. On Exhibits 1 and 2, the upper cup is composed of a lace insert, which connects the frame to the lower cup. Mr. Spivak stated that Simplex is the major component of these garments. Exhibit 3 contains stretch lace in the top cup connecting the top frame with the bottom cup, and the witness identified Techsheen, or tricot (stretch fabric) as the major component. Tr. at 24. On Exhibits 5, 7, and 8, there is scalloped lace, and on Exhibit 6, there is a strip of lace, present along the upper edge of each top cup. This latter exhibit also contains lace along the outer edge of each cup, connecting the back panel to the cups.

DISCUSSION

The headnote to Schedule 3, under which items 376.24, and 376.28 appear, defines a lace article as:

> 2. (h) * * * an article which (exclusive of any added ornamentation) is wholly or almost wholly of lace, including burnt-out lace, * * * whether the lace or net pre-existed or was formed in the process of producing the article.

The relevant General Headnote to the TSUS is:

> 9. *Definitions.*
>
> (f)(ii) "wholly of" means that the article is, except for negligible or insignificant quantities of some other material or materials, composed completely of the named material;
>
> (iii) "almost wholly of" means that the essential character of the article is imparted by the named material, notwithstanding the fact that significant quantities of some other material or materials may be present;

The tariff term "almost wholly of" was interpreted in *United States China & Glass Co.* v. *United States,* 61 Cust. Ct. 386, C.D. 3637, 293 F. Supp. 734 (1968). In applying the definition in General Headnote 9(f), the court stated that "[t]he character of an article is that attribute which strongly marks or serves to distinguish what it

is. Its essential character is that which is indispensable to the structure, core or condition of the article, i.e., what it is." 61 Cust. Ct. at 389, 293 F. Supp. at 737. In that instance, a glass water ball, with an inset of plastic decorative flowers set on a base, was not almost wholly of plastic. The court held that it was the glass ball which was indispensable and distinguishing since the plastic flowers could easily be substituted; but without the glass ball, the flowers and base were without utility. *Id.*

In an attempt to sharpen this analysis, it has been stated that discernment of the essential characteristic may:

> be found in concentrating on whether the material in question supplies the distinctive feature of the article and not in examining all the characteristics of the article and, if some other material contributes important characteristics, declining to give one material the primacy which its role deserves * * *.
>
> Therefore, the existence of other materials which impart something to the article ought not to preclude an attempt to isolate the most outstanding and distinctive characteristic of the article and to detect the component material responsible for that "essential characteristic."

Canadian Vinyl Industries, Inc. v. *United States,* 76 Cust. Ct. 1, 2–3, C.D. 4626 (1976), *aff'd,* 64 CCPA 97, C.A.D. 1189, 555 F.2d 806 (1977).

The issue in this case, therefore, is whether the lace provides the essential characteristic to the brassieres and makes them what they are. Of the styles considered by Customs to be of lace (Exhibits 1, 2 and 3), the lace inserts comprise the top cup of the brassieres. The major components of the articles are the Techsheen and Simplex (the stretch material). Notwithstanding the significant quantities of these materials, can it be said that the lace is the outstanding and distinctive attribute of these garments: are these lace brassieres? According to Mr. Spivak, in the industry, lace brassieres consist of full cups of lace. Tr. at 25. These articles do not meet that standard. Furthermore, Mr. Spivak stated that the purpose of a brassiere is to give support, and to contain and shape a woman's breasts. Tr. at 22. The lace is not the component responsible for these functions. As to Exhibits 1–3, the witness identified the bottom cup, bands, frames and back panels as providing the major sources of support. Tr. at 23–24.

Defendant argues that the lace distinguishes these particular styles from other types of brassieres, citing *A.N. Deringer, Inc.* v. *United States,* 66 Cust. Ct. 378, C.D. 4218 (1971). Children's waterproof snowsuits consisting of an outershell of neoprene waterproof coated nylon and a quilted lining, were distinguishable by their water resistant quality. While the quilted lining supplied warmth to the wearer, an important characteristic of a snowsuit, the added feature which furnished the essential characteristic to the article was its water resistance.

No doubt the articles here in issue are more appealing to the eye than are brassieres without lace. However, it does not follow that because the lace is visually distinctive, it provides the essential characteristic. *Cf. Larry B. Watson Co., A/C Decoration Products Co.* v. *United States,* 64 Cust. Ct. 343, C.D. 4001 (1970). Defendant maintains that the lace brassieres are a more attractive, and thus more marketable item; therefore, this is the essential characteristic since the lace causes the consumer to purchase these styles. Nonetheless, the Court is mindful of Mr. Spivak's testimony that a prettier garment would likely sell more "as long as it does the function it's supposed to do." Tr. at 49. Clearly, the function of the garments, for support and shape, is not provided by the lace. Thus, when other components of the article provide equally essential aspects, the court should decline to characterize this one component as imparting the essential character to the garments. *Marshall Co., Inc., et. al.* v. *United States,* 67 Cust. Ct. 316, 324, C.D. 4291, 334 F. Supp. 643, 648–649 (1971); *accord Oak Laminates* v. *United States,* 8 CIT 175, 182, 628 F. Supp. 1577, 1583 (1984). Therefore, the lace is not *the* essential characteristic of Exhibits 1–3. These styles cannot be classified as lace articles within the meaning of that term under item 376.24.[2]

The second issue is whether Exhibits 5–8 are ornamented as a result of the lace edging. Headnote 3 to Schedule 3, TSUS, sets forth the relevant criteria for ornamentation:

> 3. (a) the term *"ornamented",* * * * means fabrics and other articles of textile materials which are ornamented with—
>
> * * * * * * *
>
> (iii) *lace,* netting, braid, fringe, edging, tucking, or trimming, or textile fabric; [emphasis added]
>
> * * * * * * *
>
> (b) ornamentation of the types or methods covered * * * consists of ornamenting work done to a pre-existing textile fabric, whether the ornamentation was applied to such fabric—
>
> (i) when it was in the piece,
> (ii) after it had been made or cut to a size for particular furnishings, wearing apparel, or other article, or
> (iii) after it had actually been incorporated into another article,
>
> and if such textile fabric remains visible at least in significant part, after ornamentation: *Provided,* That lace, netting, * * * shall not be required to have had a separate existence from the fabric or other article on which it appears

[2] Defendant concedes that the articles are not "wholly of lace" and they do not meet the definition in General Headnote 9(f)(ii).

in order to constitute ornamentation for the purpose of this headnote;

The focus is not on whether the lace is ornamental, but rather whether the addition of lace makes the brassieres an ornamented fabric in an accepted trade sense. *Excelsior Import Associates, Inc.* v. *United States,* 79 Cust. Ct. 144, 147, C.D. 4726, 444 F. Supp. 780, 782 (1977), *aff'd,* 66 CCPA 1, C.A.D. 1212, 583 F.2d 513 (1978). "[T]he emphasis is upon the article to be adorned or embellished, not the substantive matter of what constitutes ornamentation in the first instance." *Blairmoor Knitwear Corp.* v. *United States,* 60 Cust. Ct. 388, 392, C.D. 3396, 284 F. Supp. 315, 318 (1968). Further, it is the resultant effect upon the merchandise and not the subjective motivation of the importer which controls classification of the article. *Excelsior,* 79 Cust. Ct. at 148, 444 F. Supp. at 783.

The presence of lace per se does not constitute ornamentation. Rather, the application of a two step analysis set forth in *United States* v. *Endicott Johnson Corp.,* 67 CCPA 47, C.A.D. 1242, 617 F.2d 278 (1980), determines whether an article is ornamented for tariff purposes. The first question is: Does the addition of the feature impart no more than an incidental decorative effect? The second inquiry is whether the feature has a functionality which is primary to any ornamentive nature. An affirmative response to either results in a nonornamental classification, and resolution of the first inquiry may eliminate the necessity of the second. 67 CCPA at 50, 617 F.2d at 281. The issue as to the ornamental effect is a question of fact and if the importer proves by a preponderance of the evidence that the ornamental aspects are incidental, no additional proof of functionality is needed. *Id. See also Tariff Classification Study,* Schedule 3, Textile Fibers and Textile Products, Explanatory and Background Materials at 6–7 (primary purpose of the decorative feature must be for ornamentation).

Clearly, an examination of the garments reveals that the lace provides more than an incidental decorative effect. Each style, (Exhibits 5–8) contains scalloped lace or a strip of "dainty lace", extending approximately one half to one inch from the end of the stretch material, trimming the edge of each cup. This provides a sharp contrast to the stretch material or nylon composing the remainder of the garment. Ornamentation has been construed to embrace that which enhances, embellishes, decorates, or adorns. *Blairmoor,* 60 Cust. Ct. at 395, 284 F. Supp. at 320. The scalloped lace certainly embellishes and adorns the brassieres by adding eye appeal. The question therefore, is whether this lace serves a utilitarian function which is primary to its ornamentive aspects.

As the court in *Blairmoor* stated, "a distinction must be drawn between that which finishes, joins, serves a utilitarian purpose, and only incidentally ornaments, and that which primarily adorns, embellishes, or ornaments." 60 Cust. Ct. at 393, 294 F. Supp. at 319. In

that instance, crochet stitches used to finish the edge of a sweater and connect it to the knitted lining did not constitute ornamentation. It was held that the edging was an integral part of the sweater since neither the outer shell nor the lining could be worn alone. Similarly, in *The Ferriswheel* v. *United States,* 68 CCPA 21, C.A.D. 1260, 644 F.2d 865 (1981), fringe on the edge of the merchandise was primarily functional to prevent unraveling. It was evident that the cut edges of the merchandise needed some form of finishing to prevent fraying.

Plaintiff's witness testified that the lace serves a similar purpose in that it finishes the edges of the cups and in some styles, connects the component parts of the brassieres, or helps contain the breast. The witness further concluded that there was no distinction between Exhibits 5–8, and Exhibit 4, which the government conceded was not ornamented. However, in determining whether the primary purpose of the lace is ornamentation or functionality, the controlling consideration is the actual appearance of the decorative material. *Ferriswheel,* 68 CCPA at 26, 644 F.2d at 868. The fringe in that case was less than one quarter inch wide, matched the fabric of the garment, and was noticeable only upon close inspection. *Id.* The fringe was indistinguishable from the edging in *Blairmoor,* where the crochet stitches were similar in kind and color to those used in the sweater, which was so decorative in itself, that the stitches were scarcely distinctive. 60 Cust. Ct. at 393, 284 F. Supp. at 319. The same cannot be said of the lace on these brassieres. While the lace may provide functionality in that some material was necessary to finish the edges, and to complete and connect the cups for proper support, the lace is patently distinctive from the rest of the garment. *See Brittania Sportswear* v. *United States,* 5 CIT 212, 214 (1983).

There is no question that other material could have been used instead of the lace, but as the witness stated, this material was chosen because it "looked better". The Court is mindful that the test for ornamentation is not whether the added fabric is necessary, *Ferriswheel,* 68 CCPA at 25, 644 F.2d at 868; nor is it per se ornamentation because a simpler fabric might have been used. *Blairmoor,* 60 Cust. Ct. at 393, 284 F. Supp. at 319. Nonetheless, the evidence demonstrates that the *primary* purpose of the lace is for its ornamental effect while serving an incidental utilitarian function. *See The Baylis Bros. Inc.* v. *United States,* 56 CCPA 115, 117, C.A.D. 964, 416 F.2d 1383, 1384–1385 (1969). Therefore, the merchandise represented by plaintiff's exhibits 5–8 are properly classified under item 376.24, TSUS.

CONCLUSION

As to those entries represented by style nos. 3511, 3590, and 3665, classified by Customs under item 376.24, TSUS, plaintiff has overcome the presumption of correctness attaching to the Customs' deci-

sion. The Court is persuaded that the lace is not the essential characteristic of the brassieres. Therefore, these entries must be classified under item 376.28, TSUS. However, in reference to style nos. 3032, 3364, 3703, and 3952, plaintiff has failed to demonstrate that the lace is either incidentally decorative, or primarily functional. The Customs' classification of these styles under item 376.24, TSUS, as ornamented articles, is thus affirmed. Judgment will enter accordingly.

(Slip Op. 87–13)

CHEVRON U.S.A., INC., CITIES SERVICE OIL AND GAS CORP., AND PHILLIPS PETROLEUM CO., PLAINTIFFS AND EXXON CORP. PLAINTIFF-INTERVENOR *v.* UNITED STATES AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS AND KAISER STEEL CORP. AND INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, DEFENDANT-INTERVENORS

Court Nos. 86–06–00788 and 86–06–00789

Before NICHOLAS TSOUCALAS, *Judge.*

[McDermott, Inc. granted *amicus curiae* status in order to oppose release of confidential business information under protective order. Request for access, subject to protective order, to contents of confidential administrative record granted in part.]

(Decided February 6, 1987)

Pillsbury, Madison & Sutro (Donald E. deKieffer, Francis J. Sailer and *Frank J. Schuchat)* for plaintiff Chevron U.S.A., Inc.

Arnold & Porter (Patrick F.J. Macrory and *M. Howard Morse)* for plaintiff Cities Service Oil and Gas Corporation in Court No. 86–06–00789.

Busby, Rehm and Leonard, P.C. (Will E. Leonard and *Edward R. Easton)* for plaintiff Phillips Petroleum Company.

Covington & Burling (Harvey M. Applebaum and *David R. Grace)* for plaintiff-intervenor Exxon Corporation.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, Department of Justice *(Platte B. Moring, III)* for defendants.

Collier, Shannon, Rill & Scott (David A. Hartquist and *Kathleen Weaver Cannon)* for defendant-intervenors Kaiser Steel Corporation and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers.

Cahill, Gordon & Reindel (Donald J. Mulvihill and *Marshall Silverberg)* for applicant McDermott, Inc.

OPINION & ORDER

TSOUCALAS, *Judge:* These actions are before the Court on motion of McDermott, Inc. (McDermott) to intervene for the limited purpose of contesting the release of business information submitted to the International Trade Commission (ITC) in connection with investigations of allegedly subsidized and less than fair value imports of jack-

ets and piles from Korea and Japan for use in offshore oil and gas drilling platforms.

BACKGROUND

Plaintiffs, importers of the merchandise which was the subject of investigation, instituted these actions to contest antidumping and countervailing duty orders, as well as the related administrative determinations, covering imports of offshore platform jackets and piles from Korea and Japan. 51 Fed. Reg. 18,641–44 (1986).

McDermott chose not to become a party to the administrative proceedings in these investigations, at least in part, in order to prevent the disclosure of sensitive business information. McDermott represents to the Court that it completed the ITC's questionnaire after the agency threatened to employ its subpoena power to obtain the requested data. In an attempt to assuage the movant's concerns about possible disclosure of its questionnaire, the ITC agreed to inform McDermott of requests for access to the information, and to "preserve the confidentiality of the information except as required by law." *Motion to Intervene by McDermott, Inc. for the Limited Purpose of Opposing the Plaintiffs' Joint Motion for Access to Confidential Information Under Protective Order* at 5 (hereinafter "Motion to Intervene").

McDermott now seeks to intervene in this action solely for the purpose of opposing plaintiffs' request for access to its business data under the terms of a judicial protective order. Defendants have taken no position with regard to either the motion to intervene or the request to review the contents of the confidential administrative record.

DISCUSSION OF LAW

1. *The Motion to Intervene*

The parties contend that intervention is governed in the instant situation by USCIT R. 24(a)(2)[1]:

> (a) Intervention of Right.
>
> Upon timely application anyone shall be permitted to intervene in an action: * * * or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Plaintiffs oppose the motion to intervene on the grounds that McDermott has eschewed any interest in the property or transaction which is the subject of the action by failing to participate in the ad-

[1] McDermott explains, *Motion to Intervene* at 7, that it was not a party to the proceeding and therefore does not seek to intervene pursuant to Rule 24(a)(1). *See* 28 U.S.C. § 2631(j)(1)(B) (1982) (in action brought under 19 U.S.C. § 1516a, only an interested party who was party to the proceeding may intervene, and such intervention is of right). *See also Matsushita Elec. Indus. Co. v. United States*, 2 CIT 254, 255 & n.2, 529 F. Supp. 664, 666 & n.2 (1981) (intervention in antidumping action strictly controlled by statute).

ministrative proceedings. Further, plaintiffs contend that McDermott can be fully protected against improper disclosure of its business information through the commonly used device of a protective order. *Plaintiffs' Opposition to Motion to Invervene* at 3–4.

The data contained in the questionnaire submitted by McDermott concerns sensitive matters such as:

> production quantities, inventories, quantities and values of sales, annual production capacities, distribution of net sales, profit and loss and other financial data, capital expenditures, various employment-related information (including wages), and domestic prices.

Motion to Intervene at 4. Particularly in view of the government's failure to take a position on the issues under consideration, the Court believes that McDermott's participation, pursuant to USCIT R, 76, as *amicus curiae* would be beneficial in determining whether to allow the parties access to the entire contents of the confidential administrative record.[2] *See Roquette Freres* v. *United States*, 4 CIT 239, *order amended*, 4 CIT 257, 554 F. Supp. 1246 (1982) (nonparty submitter participated as *amicus curiae* to oppose release of its business data).[3]

2. *Release of the Confidential Information*

The revelant statute gives a court wide latitude in deciding whether to release confidential information:

> **(B) Confidential or privileged material.**—The confidential or privileged status accorded to any documents, comments, or information shall be preserved in any action under this section. Notwithstanding the preceding sentence, the court may examine, in camera, the confidential or privileged material, and may disclose such material under such terms and conditions as it may order.

19 U.S.C. § 1516a(b)(2)(B) (1982). *See also* USCIT R. 26(c)(7) (allowing the court to order that "commercial information not be disclosed or be disclosed only in a designated way").

In deciding whether to release confidential information pursuant to protective order, a court will balance the "need for the materials sought against the potential harm that would result from their disclosure." *Roses, Inc.* v. *United States*, 1 CIT 116, 117 (1981); *Jernberg Forgings Co.* v. *United States*, 8 CIT 275, 276, 598 F. Supp. 390, 392 (1984); *Katunich* v. *Donovan*, 6 CIT 226, 227, 576 F. Supp. 636, 638

[2] That movant urges denial of part of plaintiffs' discovery request, while defendants take no position on the matter, should present no bar to this Court's consideration of McDermott's brief. In the words of one court, "[i]n the abstract, the Court sees no limitation to the issues on which a brief by *amicus curiae* may be found useful. Nor is it an objection that *amicus* has an adversarial objective." *Stewart-Warner Corp.* v. *United States*, 4 CIT 141, 142 (1982).

[3] As explained previously, McDermott has moved to intervene in this action solely to oppose release of its confidential business information, and it disclaims any other interest in the litigation. The court is mindful that pursuant to Fed. R. Civ. P. 24(a)(2), which is identical to USCIT R. 24(a)(2), limited intervention has been permitted for the purpose of contesting a discovery request. *See United States* v. *AT&T Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980) (third party claim of work product privilege in documents sought qualifies as interest relating to the subject of the action); *but cf. Donaldson* v. *United States*, 400 U.S. 517, 531 (1971) (taxpayer does not have a protectable interest in tax records compiled by employer that would justify intervention in IRS summons enforcement proceeding). Given that *amicus* status allows movant to accomplish what it has sought by virtue of its motion—an opportunity to present its views on access to the confidential record—the Court need not reach the question as to whether the criteria for intervention have been established.

(1983); *Nakajima All Co.* v. *United States,* 2 CIT 170, 174 (1981); *Connors Steel Co.* v. *United States,* 85 Cust. Ct. 112, 113, C.R.D. 80–9, *modification denied,* 85 Cust. Ct. 132, C.R.D. 80–17 (1980). The specific considerations that underlie this balancing test have been detailed as follows:

> (1) the needs of the litigants for data used by the Government in order to adequately respond to the antidumping finding, (2) the need of the Government in obtaining confidential information from businesses in future proceedings, and (3) the needs of the producers of [the subject merchandise] to protect from disclosure information which, in the hands of a competitor, might injure their respective positions to the industry.

Roquette Freres, 4 CIT at 240–41, 554 F. Supp. at 1248; *American Spring Wire Corp.* v. *United States,* 5 CIT 256, 257, 566 F. Supp. 1538, 1539–40 (1983).

As other courts have recognized, improper disclosure, albeit inadvertently, of confidential business information can be highly damaging to a business. *See, e.g., Nakajima All Co.,* 29 CIT at 173 ("Clearly, disclosure * * * may cause incalculable harm."). The Court must also consider the potential effect on other persons if McDermott's information is released. Arguably, such disclosure might dampen the willingness of other corporations to provide information in future investigations. Although the United States takes no position with regard to the motion at issue, in the past, it has emphasized the importance of voluntary compliance with requests for information in antidumping and countervailing duty investigations. *See Roses, Inc.* v. *United States,* 9 CIT 28, Slip Op. 85–7 at 2 (1985); *Japan Exlan Co.* v. *United States,* 1 CIT 286 (1981). Despite the ITC's subpoena power, 19 U.S.C. § 1333 (1982); 19 C.F.R. § 207.8 (1986), it relies upon the cooperation of respondents to its queries for information in order to comply with the statutory deadlines for completion of its determinations. *See Atlantic Sugar, Ltd.* v. *United States,* 744 F.2d 1556, 1560 (Fed. Cir. 1984) (emphasizing time restraints limiting practical utility of ITC's subpoena power).

It is clear that a court has the authority to "deny access to all where the specific facts indicate a probability that confidentiality, under any form of protective order, would be seriously at risk." *United States Steel Corp.* v. *United States,* 730 F.2d 1465, 1469 (Fed. Cir. 1984), *vacating,* 6 CIT 55, 569 F. Supp. 870, *reh'g denied,* 6 CIT 176, *opinion amended,* 6 CIT 238, 578 F. Supp. 415 (1983). Notwithstanding that authority, release of the data under protective order to counsel, as officers of the court, is generally considered sufficient to address the foregoing concerns.[4] *See also Katunich,* 6 CIT at 229 (relevant confidential data released to *pro se* litigants under protective order). In other words, courts that have considered the matter

[4] This is so despite the fact that use of a protective order can never be an absolute guarantee against improper disclosure and therefore may not totally allay the fears of those who submit information to the investigatory authorities. The Court hastens to add that, in the instant case, there is absolutely no reason to question counsel's ability to comply with the terms of a protective order.

have generally resolved the requisite balancing in favor of disclosure, providing the relevance of the data to the litigated issues is suitably established. In so deciding, these courts have recognized, explicitly or implicitly, the importance of judicial review of the claims raised in light of all germane evidence existing on the record. *See, e.g., United States Steel Corp.*, 730 F.2d at 1467 (failure to disclose relevant confidential data would render adversarial proceedings impossible); *Committee of United States Rayon Producers* v. *United States*, 3 CIT 177, 177–78 (1982) ("plaintiff's need for the confidential verification exhibits * * * outweighs the need in the public interest for precluding disclosure * * *.").

In the instant case, an additional factor must be considered; namely, the desire of a nonparty to the administrative proceedings, such as McDermott, to prevent release of data which "comprises the most highly sensitive and confidential information possessed by the company. It is produced for internal use only and is never disclosed outside the company." *Motion to Intervene*, Exhibit A, Lynott Affidavit at 2, ¶5. McDermott has demonstrated an unwavering reluctance to disclose its data. It chose neither to join in the filing of the petitions initiating the administrative reviews, nor to become a party to the proceedings, and disclaims any interest in the substance of the litigation. Movant apparently would urge this Court to treat this factor as decisively tipping the balance in favor of nondisclosure of the data.

There is a dearth of cases specifically treating the issue of release of nonparty business data. In *Roquette Freres*, a decision relied upon by movant, the court refused to release the confidential data of a nonparty.[5] That court, although noting the "vital" nature of the information sought, ostensibly based its holding on the fact that "[m]uch of this data was not directly relevant to the administrative determinations * * *. The industry-wide aggregate data, and not the individual producer statistics, form the basis of the administrative determinations * * *." *Roquette Freres*, 4 CIT at 241–42, 554 F. Supp. at 1248. Thus, the presence of a nonparty contesting release of its data did not cause the court to dispense with a consideration of plaintiff's need for the information. Accordingly, this Court will assess the relevancy of the subject data to the claim raised in this litigation.

The need for the data does not have to be "compelling," *Japan Exlan Co.*, 1 CIT at 287, nor must plaintiffs demonstrate "impossible prescience" by explaining exactly how McDermott's data will support the attack on the administrative determination. *See Atlantic Sugar*, 85 Cust. Ct. at 129. It has been noted that the threshold of relevancy for the purpose of disclosing the contents of the admin-

[5] In *Atlantic Sugar, Ltd.* v. *United States*, 85 Cust. Ct. 114, C.R.D. 80–10, *modification and stay denied*, 85 Cust. Ct. 128, C.R.D. 80–14 (1980), the court denied a motion by an intervenor to stay disclosure of documents pending notification and comment by all persons whose confidential information would be released subject to protective order. It was noted that under the law then in effect, there was no requirement that such persons be notified of the litigation. *Atlantic Sugar*, 85 Cust. Ct. at 128. More significantly, it opined "that possible harm to other persons by unauthorized disclosure will, in any event, be minimized by the adoption of a stringent protective order." *Id.* at 129.

istrative record, like that in civil discovery, is not high. *Jernberg Forgings,* 8 CIT at 277, 598 F. Supp. at 392. At the same time, the plaintiffs must establish that their need for the data goes beyond "mere curiosity or a vague groping for clues." *Atlantic Sugar,* 85 Cust. Ct. at 129.

Plaintiffs contend, *inter alia,* that the ITC, in its material injury investigation, failed to adequately consider each instance in which a contract was awarded to a contractor who was not part of the domestic industry. Additionally, plaintiffs claim that the difference between the low domestic bid and the winning bids by Korean producers was in all cases substantially greater than any antidumping margin or subsidy amount calculated by the International Trade Administration (ITA), and that if the sole criterion for the award of contracts was fair value or unsubsidized bids, no domestic bidder would have been awarded any of the contracts relevant to the ITC's investigations. *Plaintiffs' Complaint in Court No. 86–06–00788* at 4, 5–6; *Plaintiffs' Complaint in Court No. at 86–06–00789* at 5, 7.

The Court, after reviewing the pertinent portions of the confidential administrative record, concludes that even a minimal showing of need for McDermott's financial data has not been made. Plaintiffs plan to demonstrate the non-responsiveness of domestic producer bids, principally due to alleged deficiencies in West Coast assembly sites. Plaintiffs also plan to demonstrate that foreign bids, even with the subsidy amount or dumping margin added, would be lower than domestic bids on a given offshore platform product. It appears that the bid data useful for this purpose is in the possession of jacket and pile purchasers who solicited these bids or may be obtained from reports prepared for use by the ITC. No attempt has been made to show how disclosure of McDermott's intimate financial details would further plaintiffs' case. Since it does not appear that McDermott's questionnaire is needed for plaintiffs' challenge to the administrative findings, the Court must conclude that the interest in continued confidentiality of the data is predominant.

CONCLUSION

McDermott is granted *amicus curiae* status to present its opposition to release, subject to protective order, of the entire contents of the confidential administrative record. The Court concludes, after balancing all relevant considerations, that disclosure of McDermott's "producer's questionnaire" is not warranted, at this time, since it has not been shown to be relevant to the claims raised. In so concluding, the Court does not foreclose the possibility that it may reconsider the applicable factors upon a showing of need for the subject materials.

Within fifteen (15) days from the date of this order, plaintiffs' and defendants' counsel are to submit jointly a proposed protective order, pursuant to which, the contents of the confidential administra-

tive record in the captioned cases, with the exception of the producer's questionnaire completed by McDermott, will be disclosed.

(Slip Op. 87–14)

USX CORP. F/K/A/ UNITED STATES STEEL CORP., PLAINTIFF *v.* UNITED STATES AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS, AND PROPULSORA SIDERURGICA, S.A.I.C., DEFENDANT-INTERVENOR

Court No. 85–03–00325

[ITC determination remanded.]

(Dated February 9, 1987)

United States Steel Corporation (John J. Mangan, J. Michael Jarboe, Peter J. Koening and *Robin K. Capozzi)* for plaintiff.

Lyn M. Schlitt, General Counsel, *Michael P. Mabile,* Assistant General Counsel and *Carol McCue Veratti,* United States International Trade Commission, for defendants.

Mudge Rose Guthrie Alexander & Ferdon (David P. Houlihan, Jeffrey S. Neeley, Ann H. Price and *Kevin B. Dwyer)* for defendant-intervenor.

OPINION AND ORDER

RESTANI, *Judge:* Plaintiff initiated this action to challenge a final negative determination of the International Trade Commission (ITC) regarding cold-rolled carbon steel plates and sheets from Argentina.[1] After finding that the U.S. cold-rolled carbon steel plate and sheet industry continues to be materially injured, ITC concluded that such injury was not by reason of Less Than Fair Value (LTFV) imports from Argentina. ITC also determined that LTFV imports from Artentina presented no threat of material injury. Plaintiff argues that these findings were in error for several reasons: 1) ITC failed to evaluate the *significance* of the volume of LTFV imports from Argentina; 2) ITC improperly based its negative determination on a finding of no confirmed instances of lost sales or revenue; 3) ITC failed to cumulate Argentine imports with those from several other countries; and 4) ITC's negative determination with respect to threat of material injury was based on stale data regarding capacity utilization in the Argentine steel industry. These contentions are addressed below, following a brief discussion of the factual background of the case.

FACTS

Plaintiff filed its administrative petition with the United States Department of Commerce, International Trade Administration (ITA) and ITC on February 10, 1984. In its petition plaintiff alleged that cold-rolled sheet from Argentina was being sold, or was likely to be sold, in the United States at LTFV and, further, that such im-

[1] The challenged determination is found in USITC Pub. No. 1637, January 1985. (ITC Determination).

ports were a cause of material injury, or a threat thereof, to the corresponding domestic industry.

Following an affirmative preliminary material injury determination by ITC on Mach 26, 1984, ITA issued a preliminary determination that Argentine cold-rolled sheet was, or was likely to be sold in the United States at LTFV.[2] As a result of its determination, ITA ordered a suspension of liquidation with respect to all cold-rolled sheet from Argentina entered, or withdrawn from warehouse for consumption, on or after July 25, 1984.

In its final determination, ITA found that 100% of Argentine cold-rolled sheet was being sold in the United States at less than fair value. Weighted average dumping margins were 242.5% and 30.3% for two specific producers, and 122.3% for all others. 49 Fed. Reg. 48588, 48591 (1984). ITC subsequently initiated its final investigation, which disclosed the following facts.

The volume of Argentine cold-rolled steel imports rose constantly during the period under review, from zero tons in 1981, to 130,000 tons in 1983. During the first nine months of 1984, when liquidation of these imports was suspended, 116,000 tons were imported, which represented a 26% increase over the volume imported during the first three quarters of 1983. Following the initial introduction of Argentine cold-rolled steel into the U.S. market in 1982, levels of market penetration by Argentine imports remained fairly constant in the years reviewed by the investigation, fluctuating between .8% and .9% of the U.S. market.

The U.S. cold-rolled steel industry was mired in a recession when Argentine imports first entered the market in 1982. That year nine U.S. firms reported operating losses and the U.S. industry experienced an overall loss of $371 million. By the end of the investigatory period in 1984, the industry had shown some improvement. Shipments, capacity utilization, and employee hours had all increased by roughly 25% as compared with the industry's most depressed period in 1982. Prices of several products examined by ITC also showed increases of 10–12% from the deepest stages of the industry recession to September 1984.

Despite these gains, in September 1984 the industry still lagged behind 1981 levels in shipments and employee hours, and showed an overall loss of $43 million. Prices of domestic steel products, though higher than prices during the industry recession, were only slightly higher than pre-recession prices in 1982. These facts led ITC to conclude that the U.S. industry continued to be materially injured, but not by reason of LTFV imports from Argentina.

[2] ITC's preliminary determination was published at 49 Fed. Reg. 13442 (1984); ITA's determination was published at 49 Fed. Reg. 29991 (1984).

DETERMINATION OF NO INJURY BY REASON OF LTFV IMPORTS FROM ARGENTINA

In reviewing this determination, the court must grant a proper level of deference to ITC. The views of this court may not be freely substituted for those of ITC; nor may reversal be predicated solely on an interpretation of the facts that seems more reasonable. Only if ITC's determination is not supported by substantial evidence, or if it was reached in a manner contrary to law, may it be overturned.

ITC is required to consider three factors when examining the causal connection between imports and material injury: 1) the volume of imports, 2) the effect of imports on prices of like domestic products, and 3) the impact of imports on domestic producers of like products. 19 U.S.C. § 1677(7)(B) (1982). ITC presented its brief discussion of these factors as follows. First, ITC noted that although imports from Argentina rose consistently from 1981 to 1984, only "minimal market penetration" was achieved throughout the period of the investigation. ITC Determination at 6. Second, ITC found that while Argentine imports undersold domestic cold-rolled sheets by margins ranging from 5% to 14%, it could not confirm any actual instances of lost sales and revenue due to Argentine imports. *Id.*

In light of the facts of this case, and relevant administrative and judicial precedent, this analysis must be rejected. Under the "substantial evidence" standard of review, the court must determine whether ITC's conclusions are supported by the evidence on the record *as a whole. SSIH Equip. S.A.* v. *United States Int'l. Trade Comm'n.*, 718 F.2d 365, 382 (Fed. Cir. 1983) (additional comments of Circuit Judge Nies, quoting from *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477, 488 (1957)). ITC may not rely upon isolated tidbits of data which suggest a result contrary to the clear weight of the evidence. In this case, the reasons presented by a majority of the commissioners, without further elaboration, cannot reasonably be said to support the result reached.

In its discussion of import volume, ITC focused exclusively on the level of market penetration achieved by Argentine imports. ITC's analysis of market penetration data consisted solely of the statement that levels of market penetration remained low and stable.[3] Without discussing the significance of this trend or its relationship to other facts uncovered in the investigation, ITC then stated its bald conclusion that the U.S. industry had not been materially injured by reason of Argentine imports. The court has noted that "Congress has not only directed ITC to state its determinations but has also required the agency to *explain* those determinations * * *." *SCM Corporation* v. *United States*, 2 CIT 1, 3, 519 F. Supp. 911, 913

[3] Defendant-intervenor argues that ITC's determination is also supported by evidence that Argentine imports comprised a progressively smaller share of total cold-rolled steel imports between 1982 (7%) and 1984 (4%). In the absence of any reasoning related to such a fact, its mere existence cannot be used to sustain ITC's determination before this court. *Budd Co., Ry. Div.* v. *United States*, 1 CIT 67, 75–76, 507 F. Supp. 997, 1004 (1980) (citing *Securities and Exchange Comm'n* v. *Chenery*, 332 U.S. 194, 196 (1947)). Furthermore, it is unclear how this fact is probative on the issue of causation in light of other evidence that Argentine imports increased progressively from 1981 to 1984, and reached their highest level as a percentage of U.S. production during the first three quarters of 1984 (1.2%).

(1981) (emphasis in original) (quoting *SCM Corporation* v. *United States*, 84 Cust. Ct. 227, 242, 487 F. Supp. 96, 108 (1980)). In this case, ITC has failed to articulate any rational connection between low levels of market penetration by Argentine imports and its final negative determination. Under these circumstances, a remand is the proper remedy. *See* 2 CIT at 4, 519 F. Supp. at 913.

Congress, this court, and ITC itself have repeatedly recognized that it is the *significance* of a quantity of imports, and not absolute volume alone, that must guide ITC's analysis under section 1677(7). *See Atlantic Sugar, Ltd.* v. *United States*, 2 CIT 18, 23, 519 F. Supp. 916, 921–22 (1981). This view is reflected in the legislative history of the Trade Agreements Act of 1979, in which Congress acknowledged:

> For one industry, an apparently small volume of imports may have a significant impact on the market; for another, the same volume might not be significant.

H.R. Rep. 317, 96th Cong., 1st Sess. 46 (1979).

In the past, ITC has recognized that import volume alone cannot be used to gauge accurately the effects of imports in the cold-rolled steel industry. ITC noted that cold-rolled steel is inherently price sensitive and fungible, and stated that "the impact of seemingly small import volumes * * * is magnified in the marketplace." *Certain Carbon Steel Products from Spain*, USITC Pub. No. 1331, at 16–17 (1982). In the case cited above ITC based its affirmative finding on a level of market penetration of 0.5%, roughly one-half the level involved in this case.

In its brief, ITC has attempted to distinguish the Spanish steel case by arguing that industry conditions were far more depressed at the time that decision was rendered. *See* discussion of industry conditions, *supra* page 4. But this argument miscasts the real basis of the Spanish steel decision: the inherent fungibility and price sensitivity of the product. These factors make small quantities of imports particularly significant in the U.S. market. Although the general health of the U.S. industry may be one possible consideration in assessing the effect of a small volume of imports, it was not cited as a significant consideration in arriving at this negative determination. Furthermore, the mere fact that an industry has been lifted out of a recession can not automatically trigger the conclusion that foreign imports are not affecting the domestic market. The economic recovery of an industry can also be stymied by low-priced imports, which expand their share of the recovering market and create artificially low prices. In this case Argentine imports expanded throughout the domestic industry's recession and recovery, and consistently undersold domestic products.[4] In light of these trends, ITC's limited discussion of import volume is inadequate to support its decision.

[4] ITC's determination states that published domestic prices during 1982 and 1983 did not reflect market reality, and that discounting of prices continued during 1983. These facts may indicate that steel imports reduced potential price increases during the industry's recovery period. ITC Determination at a–23 n.1.

ITC's failure to confirm instances of lost sales and revenue attributable to Argentine imports is also an inappropriate justification for the negative determination. ITC has admitted that it failed to investigate four of seven allegations of lost sales and all three reported instances of lost revenue. Based solely on this limited investigation, ITC concluded that proven, consistent margins of underselling between 4% and 16% did not support an affirmative finding.

It is, of course, axiomatic that an administrative agency may not base its decision on inadequately collected data. *Atlantic Sugar, Ltd.* v. *United States,* 744 F. 2d 1556, 1561 (Fed. Cir. 1984). To correct procedural errors of this nature, a remand back to the agency is often the appropriate remedy. *Id.* In this case, however, ITC argues that a remand is not necessary because anecdotal evidence about lost revenue is often unpersuasive in cases involving fungible goods. *Gifford-Hill Cement Co.* v. *United States,* 9 CIT ——, 615 F. Supp. 577, 586 (1985). Thus, ITC contends that remanding this action would serve no useful purpose.

Defendant did not misstate the position of the court with regard to anecdotal evidence of lost sales and revenue in antidumping investigations. *See also, Lone Star Steel Company* v. *United States,* 10 CIT ——, Slip Op. 86–122, at 5–6 (November 28, 1986). It has, however, misperceived its import. In some cases anecdotal evidence of lost revenue may shed some light, but such evidence is not, *per se,* a reason to remand a negative determination. Neither is the lack of such evidence, *per se,* a justification for a negative decision, especially where an inadequate investigation has occurred.

Since ITC has relied exclusively upon instances of lost sales and revenue to show the effect Argentine imports have had on the U.S. industry, it must undertake a more thorough investigation and consideration of these factors. In the face of steadily rising import volume and proven margins of underselling between 4% and 16%, ITC's analysis cannot be deemed supported by substantial evidence.

CUMULATION

Plaintiff also challenges ITC's decision not to cumulate Argentine imports with those from Brazil, Korea, South Africa and Spain.[5] Individual commissioners offered a number of different reasons for rejecting cumulation in this case. One commissioner stated that it was improper to engage in the practice of "cross-cumulating" imports. ITC Determination at 9–10. Cross-cumulation occurs when imports subject to antidumping orders are cumulated with imports subject to duties under the countervailing duty laws. Two others rejected cumulation because Argentine imports did not "contribute to the material injury suffered by the domestic industry." *Id.* at 8 n.30. Another commissioner refused to cumulate imports because there

[5] Cumulation is a method of assessing the volume and price effects of imports from a particular country by examining the volume and effect of imports from that country together with like imports from other countries.

was "no evidence of coordinated activity between Argentina and any other country * * *." ITC Determination at 8 n.29.

The court starts with the premise that ITC's past practice has been to cumulate where the conditions of trade so warrant. *See Certain Steel Products from Belgium, Brazil, France, Italy, Luxembourg, The Netherlands, Romania, The United Kingdom, and West Germany,* USITC Pub. No. 1221, at 16–17 (1982). Where the conditions of trade indicate cumulation would be appropriate, it may be arbitrary and an abuse of discretion to fail to cumulate. *See Lone Star Steel Co.,* Slip Op. 86–122, at 7 (prior to the 1984 Act commissioners may find cumulation is not appropriate where the subject countries' imports display disparate trends with respect to underselling and import volume). *See also, American Grape Growers Alliance* v. *United States,* 9 CIT ——, 615 F. Supp. 603, 605 (1985) (stating, in *dictum,* that a final determination not to cumulate because imports are not "like products" should be based on fully developed investigative facts), *remanded on other grounds,* No. 85–2717 (Fed. Cir. April 7, 1986) (remanded for reconsideration in light of *American Lamb Co.* v. *United States,* 785 F.2d 994 (Fed. Cir. 1986)). The four commissioners who elected not to cumulate imports did not base their decisions on a single reason or set of reasons. Thus, the commissioners' opinions must be examined separately.

Initially, the court addresses the contention that cumulation is inappropriate because Argentine imports, standing alone, were not a contributing cause of injury. The commissioners based their conclusion on the relatively stable U.S. market share of Argentine steel, and the absence of reported instances of lost sales and revenue. ITC Determination at 8 n.30.

The court has noted that the propriety of the "contributing effect" test depends on how the test is applied. Prior to the effective date of the Trade and Tariff Act of 1984,[6] where one nation's exports to the U.S. demonstrated trends in the U.S. market that were distinct from the market patterns of other countries' exports, or where other conditions of trade indicated that cumulation would be inappropriate, the "contributing effect" test could justify a decision not to cumulate.[7] In this case, the commissioners' decision not to cumulate was based, in part, on the fact that Argentine imports "remained at a relatively constant or declining share of the market while imports from other sources were increasing." ITC Determination at 8. Such a difference in market trends may justify a decision not to cumulate imports, provided such trends reflect actual differences in the way imports affect the domestic market. Here, however, it is possible that the disparate trends were caused by the initiation of these proceedings and ITA's subsequent orders to suspend liquidation. This court and ITC consistently have recognized that the initiation of antidumping and countervailing duty proceedings

[6] *See* 19 U.S.C. § 1677(7)(C)(iv) (Supp. III 1985) (establishing a "competition" standard for cumulating imports).
[7] *See Lone Star Steel Co.,* Slip Op. 86–122, at 8; *Gifford-Hill,* 9 CIT at ——, 615 F. Supp. at 590 n.16.

can create an artificially low demand for affected imports, thus distorting the data on which ITC relies in making its determination. *Rhone Poulenc, S.A.* v. *United States,* 8 CIT 47, 53, 592 F. Supp. 1318, 1324 (1984). In this case, despite the suspension of liquidation of Argentine imports, import volume actually *increased* by roughly 25% over the same period in 1983. While the size of this increase may seem small compared to the advances made by Spain (327%) and the Republic of Korea (155%) during the same period, the increase might have been much larger had liquidation of imports not been suspended. In general, data compiled by ITC indicate that antidumping and countervailing duty proceedings probably had a strong effect on foreign import volume. Brazil, Spain, and Korea all experienced reduced export volume in years when investigations were initiated or liquidation of imports was suspended. *See* ITC Determination at a–21 and at Appendix G. In some cases, the court will defer to ITC's judgment as to the cause of the disparate trends. It is clear in this case, however, that ITC did not analyze the issue fully. For example, not all of the exporting countries with which the plaintiff has requested cumulation experienced dramatic increases in absolute volume and market share.[8] The court cannot defer to a decision which is based on inadequate analysis or reasoning.

The contributing effect test is also improperly applied when it creates a process of circular reasoning that renders cumulation a vestigial part of the causation analysis. *Lone Star,* Slip Op. 86–122, at 7 & n.6. The approach taken by the commissioners here may be said to be illustrative of the problem. The commissioners based their decision not to cumulate, in part, on the lack of confirmed lost sales and revenue in the U.S. market. ITC Determination at 8. These are the same factors that were cited as the basis for ITC's negative determination. Following this approach, in order for cumulation to be appropriate, evidence would first have to provide grounds for an affirmative determination regarding Argentine imports alone. In other words, this application of the "contributing effect" test requires independent causation of material injury to be demonstrated before cumulation may be used to analyze causation.

Congress specifically rejected a Senate proposal that would have incorporated this version of the "contributing effect" test in the 1984 Act, stating,

> [t]he requirements in the bill as introduced that imports from each country have a "contributing effect" *in causing material injury* would have precluded cumulation in cases where the impact of imports from each source treated individually is minimal but the combined impact is injurious.

H.R. Rep. No. 725, 98th Cong., 2d Sess. 37, *reprinted in* 1984 U.S. Code Cong. & Ad. News 4910, 5127, 5164 (emphasis added).

[8] Brazilian imports actually declined during the first three quarters of 1984, as did imports from South Africa. In the case of Brazil, this reduction might be linked to a suspension of liquidation of Brazilian imports which took effect on November 12, 1983.

Despite this legislative history and the apparent circularity of the test as applied in this case, defendant argues that the commissioners' decision was proper in light of past judicial precedent, and because Congress failed to apply the 1984 Act retroactively. The latter contention carries little weight. The legislature's decision to apply the 1984 Act prospectively cannot reasonably be viewed as an implied temporary ratification of the type of "contributing effect" test used here. Nothing in the legislative history suggests that such a result was intended; indeed, it is more probable that Congress chose to make all of the definitional sections of the new Act prospective for the sake of convenience.

Defendant also cites dicta from a case of this court to support its position, *Republic Steel Corp.* v. *United States,* 8 CIT 29, 591 F. Supp. 640 (1984). In that case the court held that the "contributing effect" test was not appropriate for *preliminary* injury determinations in countervailing duty suits. 8 CIT at 32, 591 F. Supp. at 644.[9] The court went on to state, in *dictum,* that at the final determination stage cumulation operates "only in conjunction with findings of contribution to injury from the products of particular countries." 8 CIT at 35, 591 F. Supp. at 646. The court explained the concept of "contribution to injury" in *Republic Steel* as follows:

> Common principles of fairness dictate that the final injury determination must be based on some factual connection between the imports from a specific country and an aspect of the injury to the domestic industry.

8 CIT at 34–35, 591 F. Supp. at 645.

This "factual connection" between imports and injury is currently provided by the "competition" test in the 1984 Act. Prior to the effective date of the Act, this nexus could be shown by proof that categories of foreign imports displayed similar patterns or effects in the domestic market. *Lone Star Steel Co.,* Slip Op. 86–122, at 8. The circular reasoning which confronts the court in this case was in no way condoned in *Republic Steel.*

Another commissioner refused to cumulate imports because there was no evidence of "coordinated activity" between Argentina and other countries. This position was based on the "traditional analysis" of coordinated activity that the commissioner had applied in other proceedings. ITC Determination at 8 n.29. In these prior proceedings the commissioner limited the meaning of "coordinated activity" to concerted action by importers or exporters of a commodity. *Potassium Chloride from Israel and Spain,* USITC Pub. No. 1596, at 7 n.29 (1984); *see also, Oil Country Tubular Goods from Argentina and Spain,* USITC Pub. No. 1694, at 20 n.3 (1985). The court previously held that there is no legal support for this test, to the extent it implies an "intent requirement" on the part of exporters.

[9] *Republic Steel* was recently overruled in part in *American Lamb Co.* v. *United States,* 785 F.2d 994 (Fed. Cir. 1986). The Court of Appeals decision did not address the issue of cumulation, however, so *Republic Steel* continues to be valid precedent on this point.

Lone Star Steel Co., Slip Op. 86–122, at 7 n.7. Certainly, this type of concerted action would weigh heavily in a decision to cumulate, but it is not an absolute requirement for cumulation.[10] Simply put, sole reliance upon such a test is inconsistent with the purposes of cumulation.

Finally, one commissioner stated that cumulation is always inappropriate when it would require, as in this case, cumulation across different unfair trade statutes. ITC Determination at 9–10. Plaintiff contends, to the contrary, that cross-cumulation is *required* in light of the court's recent decision in *Bingham & Taylor Div.* v. *United States*, 10 CIT ——, 627 F. Supp. 793 (1986), *appeal docketed*, No. 86–1140 (Fed. Cir. June 24, 1986). In *Bingham & Taylor*, which concerned a preliminary injury determination under the countervailing duty law, the court held that 19 U.S.C. § 1677(7)(c)(iv) (Supp. III 1985) requires ITC to assess cumulatively the volume and effect of competing imports which are subject to both antidumping and countervailing duty investigations. 10 CIT at ——, 627 F. Supp. at 795. This statutory provision had not yet taken effect when this action was initiated, so the issue facing this court is whether the commissioner's reliance on cross-cumulation as a reason for not cumulating imports was contrary to law because it was arbitrary, an abuse of discretion or otherwise unsupported by law.

Initially, the court notes that after the Customs Court's decision in *City Lumber Co.* v. *United States*, 61 Cust. Ct. 448, 290 F. Supp. 385 (1968), *aff'd*, 64 Cust. Ct. 826, 311 F. Supp. 340 (App. Term 1970), *aff'd*, 59 CCPA 89, 457 F.2d 991 (1972), members of the Tariff Commission and ITC frequently cumulated imports under the 1921 and 1979 Acts. *See, e.g., Aminoacetic Acid (Glycine) from France*, TC Pub. No. 313 (1970); *Perchloroethylene from Belgium, France, and Italy*, USITC Pub. No. 969 (1979). *Carbon Steel Wire Rod from the German Democratic Republic*, USITC Pub. No. 1607 (1984) (preliminary determination). *Potassium Chloride from Israel and Spain*, USITC Pub. No. 1596 (1984) (views of Commissioner Rohr). The practice of cumulation was limited, however, to cases in which the subject imports were all being challenged under the same unfair trade statute. In previous ITC decisions, several commissioners invited parties to comment on the legality of cross-cumulation, but the issue was never squarely addressed. *See, e.g., Carbon Steel Wire Rod from Brazil, Belgium, France, and Venezuela*, USITC Pub. No. 1230, at 20 (1982) (preliminary). Except for a fleeting reference to cross-cumulation in a prior case, this court has never ruled on the validity of cross-cumulation at the final determination stage.[11]

[10] As previously explained by Commissioner Stern, a decision to cumulate imports involves many considerations, including "the presence or absence of coordinated action and/or common approaches to the domestic market (*even if not coordinated*) so as to exhibit a collective 'hammering' effect on the domestic industry." *Certain Carbon Steel Products from Belgium, the Federal Republic of Germany, France, Italy, Luxembourg, the Netherlands, and the United Kingdom*, USITC Pub. No. 1064, at 66 (1980) (emphasis added). The words "coordinated activity," as used in the case at hand, appear to require evidence of joint planning. If the court has misunderstood the term "coordinated activity," ITC can easily clarify this point, and cite evidence of lack of coordination, if such exists.

[11] *See Gifford Hill*, 9 CIT At ——, 615 F. Supp. at 590 n.16 (1985) (noting that for cases prior to the 1984 Act no statutory language or legislative history seems to require cross-cumulation merely because dumped or subsidized imports from two or more foreign countries compete in the same U.S. market).

In this case, the commissioner's decision not to cumulate across statutes was based on section 735(b) of the 1979 Act, 19 U.S.C. § 1673d(b)(1) (1982), which requires that "final antidumping determinations are to be made 'by reason of imports of the merchandise with respect to which the administering authority has made an affirmative determination under section 735(a)(1),' i.e., those investigations for which Commerce has made a final dumping finding."[12] ITC Determination at 9. The commissioner's argument based on section 735(a)(1) of the Act, and defendant's argument based on 19 U.S.C. §§ 1671(a) and 1673 both rely on reasoning that was previously rejected by the court. In discussing a preliminary injury determination by ITC the court noted that defendant's reading of sections 1671(a) and 1673 would not only prevent cross-cumulation, but "would equally prohibit the cumulation of imports subject to two or more investigations of the same unfair trade practice." *Bingham & Taylor*, 10 CIT at ——, 627 F. Supp. at 798. Under the same analysis, if the language of section 735(a)(1) were construed to require ITC to base its final injury determination on the volume and effect only of imports of "the merchandise with respect to which [Commerce] has made an affirmative determination," cumulation of imports covered by separate investigations would always be prohibited. The court has not construed sections 1671 and 1673 in a manner that comports with defendant's interpretation. To ratify defendant's interpretation of these provisions, the court would have to reject the established practice of cumulating imports from separate investigations and its own reasoning in cases such as *Bingham & Taylor* and *City Lumber*.[13]

The legislative history of the 1979 Act strongly suggests that Congress did not enact sections 1671 and 1673 to restrict the scope of cumulation. When Congress enacted sections 1671 and 1673, the Tariff Commission and ITC had already been cumulating imports from separate investigations for more than 10 years under the Antidumping Act of 1921, ch. 14, § 201, 42 Stat. 9, 11 (1921) (repealed

[12] Defendant presents a related argument based on 19 U.S.C. §§ 1671(a) and 1673 (1982). Since this action was initiated prior to the effective date of the 1984 Act, the relevant language of section 1673 provides:

> If—
>
> (1) the administering authority determines that *a class or kind of foreign merchandise* is being, or is likely to be, sold in the United States at less than its fair value, and
>
> (2) the Commission determines that—
>
> (A) an industry in the United States—
>
> (i) is materially injured, or
> (ii) is threatened with material injury,
>
> or
>
> (B) the establishment of an industry in the United States is materially retarded, *by reason of imports of that merchandise*,
>
> then there shall be imposed upon *such merchandise* an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise.

19 U.S.C. § 1673 (1982) (emphasis added).

Defendant argues that the language of this provision restricts the ITC's injury investigation in antidumping cases to the injury caused solely by reason of *dumped* imports. Defendant cites similar language in 19 U.S.C. § 1671(a) to support the same argument with respect to injury determinations under the countervailing duty law.

[13] The commissioner who objected to cross-cumulation in this case apparently endorses the practice of cumulating imports from separate investigations. *See Carbon Steel Wire Rod From the German Democratic Republic*, USITC Pub. No. 1607, at 8–11 (1984) (Spanish and Argentine imports cumulated with East German imports subject to a separate investigation).

1979). *See City Lumber Co.*, 61 Cust. Ct. 448, 290 F. Supp. 385. Although the legislative history of the 1979 Act does not specifically refer to this prior practice, it does indicate that Congress intended for causation determinations in dumping and countervailing duty proceedings to be based on the same standards used under the 1921 Act. H.R. Rep. No. 317, 96th Cong., 1st Sess. 46–47; S. Rep. No. 249, 96th Cong., 1st Sess. 57. Assuming *arguendo* that sections 1671 and 1673 relate to cumulation, they may therefore be viewed as a restatement of prior law.[14] The court has stated that where a statute is ambiguous but has been re-enacted without change, longstanding administrative practice is deemed to have been incorporated into the statute by Congress. *Kuehne & Nagel, Inc.* v. *United States*, 10 CIT ——, Slip Op. 86–138, at 7 n.8 December 22, 1986) (citing *Commonwealth Oil Refining Co.* v. *United States*, 60 CCPA 162, 174 C.A.D. 1105 (1973)). Thus, if it took any action regarding cumulation by enacting sections 1671 and 1673, Congress endorsed the prior practice of cumulating imports from separate investigations, and rejected the non-contextual reading defendant has given these provisions.

Although its intent is not directly applicable, the Congress which passed the 1984 Act did not view sections 1671 and 1673 as imposing substantive restraints on cumulation. The mandatory cumulation provision in the 1984 Act was designed to prevent commissioners from using improper legal criteria in cumulation decisions, not to correct perceived limitations imposed on cumulation by sections 1671 and 1673. *See Options to Improve the Trade Remedy Laws: Hearings Before the Subcomm. on Trade of the Comm. on Ways and Means*, 98th Cong., 1st Sess. 197, 203 (1982) (statements of Adolph J. Lena). The cumulation amendment was not made part of sections 1671 or 1673, the general rules for imposition of additional duties,[15] but was included in section 1677(7), the specific provision defining material injury for both the countervailing duty and antidumping statutes. If the 1984 Congress had viewed sections 1671 and 1673 as barring cumulation, it certainly would not have allowed the "restrictive" language in these sections to stand without amendment. In light of this history, defendant's attempt to infuse these provisions with additional substantive direction on the issue of cumulation must be rejected.[16]

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[14] *Compare* 19 U.S.C. § 160(a) (1976) *with* 19 U.S.C. § 1673(a) (1982) (containing the same injury requirement).

[15] In *Badger-Powhatan Division* v. *United States*, 10 CIT ——, ——, 633 F. Supp. 1364, 1370 (1986), *appeal dismissed for lack of jurisdiction*, No. 86–1251 (Fed. Cir. December 29, 1986), the court ruled that section 1673 controls the actual imposition of duties by ITA. The court did not hold that it governs the specifics of ITC injury methodology.

[16] In the past, the court has recognized the importance of maintaining distinct procedures for the calculation of antidumping and countervailing duty margins by ITA. *See Al Tech Specialty Steel Corp.* v. *United States*, 10 CIT ——, Slip Op. 86–124, at 19–21 (Dec. 1, 1986); *Huffy Corp.* v. *United States*, 10 CIT ——, 632 F. Supp. 50, 55–56 (1986). These cases do not cast doubt on the legality of cross-cumulation. Injury determinations by ITC, unlike ITA margin calculations, do not relate directly to the amount of duties paid by the importer, and therefore do not undermine the integrity of the two statutes. Furthermore, unlike information gathered by ITA for subsidy and dumping margin determinations, the data relevant to injury determinations by ITC is the same in countervailing duty and dumping cases. The court's reasoning in *Al Tech* actually supports the result reached here. In *Al Tech* the court noted that, in non-market economy cases, the use of subsidized economies as surrogates would distort the calculation of dumping margins by providing a defective measuring rod. *Al Tech*, Slip Op. 86–124, at 16 (citing *Chemical Products* v. *United States*, 10 CIT ——, Slip Op. 86–115 (November 6, 1986)). In this case, the exclusion of subsidized imports otherwise eligible for cumulation would similarly distort ITC's causation analysis by understanding the full impact of like products in the domestic market.

The court's reasoning in *Bingham & Taylor* also disposes of the defendant's second argument, that is, that Congress implicitly disapproved cross-cumulation when, in accordance with GATT, it enacted separate injury tests for antidumping and countervailing duty actions. In *Bingham & Taylor,* the court stated that although Congress did enact separate injury tests, "the definition of material injury, the respective indicia of injurious impact, and the causal nexus between the injury and the unfairly traded imports are identical for subsidy and dumping investigations and are outlined in a common statutory provision—19 U.S.C. § 1677(7)." *Bingham & Taylor,* 10 CIT at ——, 627 F. Supp. at 797. Thus, Congress' decision to enact separate injury tests did not create substantive differences in the law that would justify an across-the-board prohibition of cross-cumulation.

Defendant suggests, however, that cross-cumulation is nonetheless inappropriate because only cosignatories of the Subsidies Code are entitled to an injury determination in countervailing duty cases. Defendant contends that Congress created this distinction in order to encourage countries to sign the Code. Although defendant has accurately described the intent of Congress, it has not provided a persuasive reason for rejecting cross-cumulation. To protect their exports, non-signatory countries will continue to have a strong incentive to sign the Subsidies Code, lest their exports be deprived of an injury analysis *in toto.*[17]

For these reasons, the court holds that prior to the 1984 Act, even though cross-cumulation was not mandatory for all competing imports, it was not forbidden by statute. Because a majority of the commissioners failed to cumulate imports for reasons that are contrary to law, this issue is remanded to ITC for further consideration.[18]

Threat of Material Injury

In determining whether a group of imports presents a threat of material injury to the domestic industry ITC should focus on:

> demonstrable trends—for example, the rate of increase of the subsidized or dumped exports to the U.S. market, capacity in the exporting country to generate imports, [and] the likelihood that such exports will be directed to the U.S. market taking into account the availability of other export markets, * * *.

H.R. Rep. No. 317, 96th Cong., 1st Sess. 47 (1979).

[17] Defendant's argument implies an additional concern, that in cases involving cross-cumulation, some final injury determinations could be based, in part, on subsidized imports for which no independent final injury determination had been made. Again, this argument strikes beyond the issue of cross-cumulation, to the point of invalidating present practice. Under current law, ITC often cumulates imports that are not subject to existing final antidumping or countervailing duty orders; this occurs everytime a number of countries are before ITC in the same proceeding. In all cases involving non-mandatory cumulation decisions, ITC must examine and compare relevant conditions of trade for each set of imports. Because subsidized imports from non-signatory countries must face such an inquiry in a cross-cumulation case, no greater or lesser burden on the rights of other countries to a lawful injury determination is imposed.

[18] Of course, if ITC determines that imports from Argentina even when analyzed separately caused injury to the U.S. industry, it need not address the issue of cumulation on remand.

In its determination, ITC concluded that there was no threat of material injury by reason of Argentine LTFV imports. This conclusion was supported by evidence that domestic shipments of cold-rolled steel in Argentina had increased from 1981 to 1983, and that Argentine producers were operating at maximum capacity in producing cold-rolled sheets. ITC Determination at 7–8. The investigation also revealed that between 1981 and 1984 the United States received a progressively larger share of total Argentine steel exports, and that the total volume of these exports to the U.S. had been increasing yearly. ITC was also aware that three other nations which had formerly been under investigation had entered into voluntary restraint agreements with the U.S. government. This fact, and Argentina's need to earn dollars for debt repayment, created a strong incentive for Argentina to capture a greater share of the U.S. import market.

The principal point of controversy with respect to the threat determination concerns ITC's use of Argentina production capacity figures for 1983. As discussed above, ITC relied almost exclusively on this data in formulating its negative determination. Plaintiff contends that these data are stale, and do not accurately reflect Argentina's production capacity as it existed at the time of the determination. Defendant makes two counterarguments: first, that the threat determination was properly based on the "best available evidence," and, second, that the plaintiff has waived its right to object to the 1983 data by not raising the issue at an earlier stage in the proceedings.

Plaintiff draws support for its position from *Timken Co.* v. *United States,* 10 CIT ——, 630 F. Supp. 1327 (1986). In *Timken,* the court held that ITA had abused its discretion by failing to obtain updated information for an annual review made pursuant to 19 U.S.C. § 1675 (1982). 10 CIT at ——, 630 F. Supp. at 1332–40. Defendant argues that *Timken* should not be applied to the facts of this case because the data at issue in *Timken* were much less current than the data in this case. In *Timken* the period of investigation ended 18 months prior to the preliminary determination and 2½ years prior to the final determination. In the case at bar, the capacity utilization data covered a period ending within 3 months of the preliminary determination and 13 months of the final determination. Defendant contends that if this investigation had proceeded according to a normal schedule, the final determination would have been rendered prior to January 1985.[19] Production capacity data for the entire 1984 year presumably would not have been available to ITC.

The court has noted that, although ITC generally focuses on annual time periods for the purpose of data analysis, it is not required by statute to use any particular time frame. *British Steel Corp.* v. *United States,* 8 CIT 86, 93–94, 593 F. Supp. 405, 411 (citing *Ameri-*

[19] These proceedings were interrupted by voluntary restraint agreement negotiations between the United States and the subject countries.

can Spring Wire Corp. v. *United States,* 8 CIT 20, 26, 590 F. Supp. 1273, 1279 (1984), *aff'd sub nom. ARMCO* v. *United States,* 760 F.2d 249 (Fed. Cir. 1985)). In light of ITC's broad discretion in setting time periods for the collection of data, the court has held that, under certain circumstances, ITC cannot be compelled to analyze data on a quarterly basis. *American Spring Wire Corp.,* 8 CIT at 26, 590 F. Supp. at 1279 (ITC was not required to base its findings on a quarterly analysis of the most recent data available, since analysis of quarter-by-quarter data would distort significant long term trends). *See also, British Steel Corp.,* 8 CIT at 94, 593 F. Supp. at 411 (an analysis of recent quarterly data would not have negated the significance of the increasing absolute volume of imports on a long term basis).

These decisions do not stand for the proposition that ITC has unbridled discretion in determining what data to collect in an investigation. The court repeatedly has held that ITC must acquire all obtainable or accessible information on the economic factors necessary for its analysis. *Roquette Freres* v. *United States,* 7 CIT 86, 94 & n.8, 583 F. Supp. 599, 604 & n.8 (1984) (citing *Budd,* 1 CIT at 75, 507 F. Supp. at 1003–04). Although ITC is not required to amass every conceivable shred of relevant data in order to comply with the requirements of the law, the absence of information necessary for a thorough analysis may render a determination unsupported by substantial evidence. *Kenda Rubber Industrial Co., Ltd.* v. *United States,* 10 CIT ——, 630 F. Supp. 354, 358 n.4 (1986).

In this case, ITC's failure to request production capacity data for 1984 prevented it from performing a thorough analysis on the question of material threat. Although the data at issue in this case are, perhaps, less "stale" than the data in *Timken,* their currency is no less vital to a proper resolution of this case. The year-to-year volatility of the Argentine cold-rolled steel industry is well evidenced by the data compiled by ITC. Capacity utilization figures for the Argentine industry reflected substantial yearly changes from 1981 to 1983, and information presented by plaintiff in its pre-hearing brief suggested that a substantial decline was occurring in 1984. Plaintiff's pre-hearing brief also provided the ITC with evidence of the closure of other possible Argentine export markets and Argentina's need to generate U.S. dollars for debt repayment. Although much of this information was contained in newspaper articles and industry journals, plaintiff cannot reasonably be expected to produce precise production data, which is often held in strict confidence. The information provided by plaintiff should have put ITC on notice that it might be facing vastly different industry circumstances. In its final report, the ITC staff updated statistics to include information on the quantity and pricing of Argentine imports in the U.S. market. ITC

should have pursued a similar course of action with respect to the data provided by Argentine producers.[20]

Defendant still contends, however, that the plaintiff waived its right to make this objection when it failed to request more current data at an earlier stage in the administrative proceedings. *Kokusai Electric Co.* v. *United States*, 10 CIT ——, 632 F. Supp. 23 (1986). In *Kokusai*, the court refused to allow the plaintiff to raise the issue of whether certain subassemblies were properly within the scope of ITA's investigation, when it had not raised the issue prior to the time ITA closed its investigation. 10 CIT ——, 632 F. Supp. at 28.

There are compelling reasons why the principle set forth in *Kokusai* should not be applied to this case. The court has held that the burden of ensuring up-to-date review in section 1675 proceedings before ITA should not rest upon a domestic party. *Timken*, 10 CIT at ——, 630 F. Supp. 1333. Similarly, in this case, the responsibility for making up-to-date findings rests with ITC; it cannot precondition meaningful review upon specific requests for information by the parties. Furthermore, in the instant case, plaintiff presented evidence that prior data were no longer accurate, and ITC itself publicly asked its staff to provide more up-to-date data for the final determination. Under these circumstances it would be particularly inequitable to bar plaintiff's objection. In light of these facts and the importance of the capacity utilization data to this case, it is necessary to remand this issue to ITC for further consideration.

This matter is hereby remanded to the International Trade Commission for further consideration consistent with this opinion. ITC shall file its decision on remand within 45 days hereof. Plaintiff will have 15 days from filing to respond. Defendants may reply within 10 days thereafter.

So Ordered.

(Slip Op. 87–15)

Dri Industries, Inc., plaintiff *v.* United States, defendant

Court No. 84–10–01375

Before Carman, *Judge.*

[Judgment for Defendant]

(Decided February 10, 1987)

Sharretts, Paley, Carter & Blauvelt, P.C. (Peter Jay Baskin) for the plaintiff.

Richard K. Willard, Assistant Attorney General, Joseph I. Liebman, Attorney in Charge, International Trade Field Office, *(Joseph I. Liebman)* for the defendant.

[20] At the final hearing, one commissioner recognized the importance of securing more recent data from the parties to the proceeding and asked the ITC staff to follow up on this problem. ITC transcript at 44–45. Nothing in the administrative record indicates that foreign producers were actually asked to update their capacity utilization data, and defendant-intervenor specifically denies that such a request was made. Response Brief of Defendant-intervenor Propulsora at 33. Because the court concludes that ITC erred in failing to collect and consider 1984 Argentine capacity utilization data, it does not reach the question of whether 1983 production capacity data, or the submissions contained in plaintiff's post-hearing brief, constituted the "best information available" under 19 U.S.C. § 1677e(b) (1982).

MEMORANDUM

CARMAN, *Judge:* This action involves the proper classification of an item designated as the tool chest portion of a "Tool Locker" tool chest and cabinet. Plaintiff, DRI INDUSTRIES, INC. (DRI), challenges the United States Customs Service's (Customs) classification of the subject merchandise upon liquidation as "Luggage and handbags * * * Of other material * * * Other * * * Other," under item 706.62, Tariff Schedules of the United States (1983) (TSUS) at 20 percent ad valorem.

This Court concurs with Customs' classification and assessment of duties of the tool chest holding the tool chest was properly classified as luggage under item 706.62, TSUS, and dismisses this action.

BACKGROUND AND FACTS

The merchandise which is the subject of this action consists only of the tool chest portion of an article described as a "Tool Locker" tool chest and cabinet. Although both the chest and cabinet portions were imported by plaintiff DRI into the United States from Taiwan at the same time and in the same shipping package, it is only the classification of the tool chest portion which DRI contests. The tool chest portion, which is "of iron or steel", measures approximately 19 inches wide by 12⅝ inches high by 9½ inches deep, has three pull-out drawers with knobs and a hinged top with a handle, and weighs about sixteen pounds when empty. It was classified by Customs upon liquidation under the provision of item 706.62, TSUS[1].

Plaintiff asserts the tool chest portion is, for tariff purposes, a separate article which should be classified under item A 657.25, TSUS,[2] duty free under the Generalized System of Preferences (GSP) pursuant to General Headnote 3(c), TSUS (1983).

In the event the subject merchandise (tool chest) does not qualify under the GSP, plaintiff alternatively contends the tool chest

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[1] Schedule 7, Part 1, Subpart D, item 706.62 provides in pertinent part:

	Luggage and handbags, whether or not fitted with bottle, dining, drinking, manicure, sewing, traveling, or similar sets; and flat goods:	
* * * * * * *		
	Of other material:	
* * * * * * *		
	Other:	
* * * * * * *		
706.62	Other	20% ad. val.

[2] Schedule 6, Part 3, Subpart G, item 657.25, pursuant to General Headnote 3(c), provides, in pertinent part:

	Articles of iron or steel, not coated or plated with precious metal:	
* * * * * * *		
	Other articles:	
* * * * * * *		
	Other:	
* * * * * * *		
A 657.25	Other	[Free]

should still be classified under item 657.25, TSUS,[3] at 7.6 percent ad valorem. Customs has conceded the subject merchandise is entitled to duty free entrance if the Court holds it is properly classifiable under a TSUS provision which is eligible for the G.S.P. treatment.

In the event the tool chest is held not to be classifiable under the provisions of tariff item 657.25, TSUS, plaintiff, in the second alternative, claims the tool chest is properly classifiable as an entirety with the cabinet portion under item 727.55, TSUS,[4] at 7 percent ad valorem.

DRI, nevertheless, explicitly stated in its post trial brief it did "not herein press its alternative classification claim that the subject article is for tariff purposes an entirety with the imported cabinet portion, and is therefore classifiable as 'furniture.' " Plaintiff's brief at 2.

Customs seeks dismissal of the action contending the Government's classification and assessment of duties is correct.

DISCUSSION

The question in this case is whether or not the tool chest was intended by Congress to be classified under the provision of item 706.62, TSUS, at a duty rate of 20 percent ad valorem. The issues presented by the parties center around whether the tool chest is "luggage" under item 706.62, TSUS, as defined in TSUS Schedule 7, Part 1, Subpart D, headnote 2(a)(ii), which states:

> 2. For the purposes of the tariff schedules—(a) the term *"luggage"* covers—
>
> * * * * * * *
>
> (ii) brief cases, portfolios, school bags, photographic equipment bags, golf bags, camera cases, binocular cases, gun cases, occupational luggage cases (physicians', sample, etc.), and like containers and cases designed to be carried with the person, except handbags as defined herein;

Customs presented exhibits at trial which were representative literature used to depict and describe the tool chest and cabinet for purposes of advertising the merchandise for the retail or wholesale markets. Examination of those exhibits reveals the tool chest is depicted and described as a "separate unit" from the cabinet. The tool chest is described as a "Heavy-Duty, Carry-Along, Three-Drawer

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[3] Schedule 6, Part 3, Subpart G, item 657.25, not subject to preferential treatment, provides in pertinent part:

	Articles of iron or steel, not coated or plated with precious metal:	
	* * * * * * *	
	Other articles:	
	* * * * * * *	
	Other:	
	* * * * * * *	
657.25	Other	7.6 ad val.

[4] Schedule 7, Part 4, Subpart A, item 727.55, provides in pertinent part:

	Furniture, and parts thereof, not specially provided for:	
	* * * * * * *	
727.55	Other	7% ad val.

Tool Chest" which you "can carry-along wherever you need it." The tool chest is promoted as "[a] totally professional way to securely store and conveniently transport your tools and supplies." The tool chest is "portable" and "will go right to the work site." the "Double Slider Safety Drawers lock-in automatically" which "[m]akes transporting easy * * *." The literature also displayed pictures of various people using the tool chest, one of which depicted a man kneeling by a water heater with the tool chest on the floor by his side.

DRI presented expert testimony of four witnesses: a plumber, an electrician, an executive of DRI, and a buyer for a large retail chain store, who all agreed the primary purpose of the tool chest and cabinet was for the storing and organizing of tools. Some of these witnesses also testified the tool chest had the capability of being portable. One of these witnesses, the chief executive officer and owner of DRI, testified the tool chest could be transported from place to place but only on a limited basis, *i.e.*, within the house, from one house to another, and from one place to a distant place when taken in an automobile.

Customs' sole expert witness was vice-president of a business which has manufactured and sold metal products, primarily tool boxes and chests, since 1947. He testified his business manufactures a tool chest similar to the tool chest in question. His opinion was the primary purpose of any tool box is to store and organize tools, but his company's tool chest, as is true of DRI's, is designed to be carried and transported from place to place.

The actual tool chest and cabinet, which is the subject of this action, was placed in evidence and thoroughly examined by this Court.

The Court notes at the outset of this discussion:

> A presumption of correctness attaches to a classification by the Customs Service, and the importer has the burden of proving that the classification is incorrect * * *. To give effect to this presumption the courts have long imposed a "dual burden" of proof: the importer must prove not only that the government's classification is incorrect but also that the importer's proposed classification is correct.
>
> * * * * * * *
>
> But the trial court cannot determine the correct result simply by dismissing the importer's alternative as incorrect. It must consider whether the government's classification is correct, both independently and in comparison with the importer's alternative.

Jarvis Clark Co. v. *United States*, 733 F.2d 873, 876, 878 (Fed. Cir. 1984) (citations and footnote omitted); *see* 28 U.S.C. § 2639(a)(1)(1986).

DRI's main contentions are the primary purpose of the tool chest as supported by testimony, is to organize and store tools, and this

"[p]rimary [d]esign [a]nd [f]unction [c]ontrols [the] [c]lassification" of the tool chest. DRI states:

> [T]he subject tools chests are not luggage [as set forth in headnote 2(a)] because they were designed primarily for a purpose other than to be carried with a person[;] * * * they were not designed to be used during the type of travel contemplated by the tariff provisions covering luggage.

Plaintiff's Reply Brief at 3. "There is no indication given by the statutory language, or found in prior case law, that an article would qualify as luggage merely by fulfilling the minimum requirement of having been designed for or capable of being carried around * * *." Plaintiff's Brief at 50. On the contrary, DRI argues, "[a]n examination of the statutory exemplars, and the rules of *ejusdem generis*[5] demonstrates the sort of travel intended by Congress." *Id.* at 51.

Customs basically argues headnote 2(a)(ii) does not have travel as a primary use for those items included within the scope of the definition of "luggage". Unlike headnote 2(a)(i) which does deal with travel, "2(a)(ii) is not qualified by requirements that the primary or chief use or design of the articles embraced there be for travel." Defendant's Brief at 18. The exemplars listed in 2(a)(ii) are containers designed for storage, protection, and organization of their respective contents with the additional requirement other articles, to be included but not listed, be "like containers and cases designed to be carried with the person." 2(a)(ii). No intent of Congress for a travel requirement, as stated in 2(a)(i), is provided therein. Customs maintains, under the doctrine of *ejusdem generis,* the tool chest is a portable container or case "like" those exemplars listed in 2(a)(ii) because they all retain a common characteristic of being designed to hold or store specific items and are all designed to be carried with a person.

Where the issues involved concern

> statutory construction "our starting point must be the language employed by Congress," *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979), and we assume "that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards* v. *United States*, 369 U.S. 1, 9 (1962). Thus "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

American Tobacco Co. v. *Patterson*, 456 U.S. 63, 68 (1982); *see Izod Outerwear*, Slip Op. 85–72 at 3.

Where the statutory language is unclear, rules of statutory construction are useful for interpretation. Of utmost concern in these situations is the legislative intent. Any rule of construction result-

[5] *Ejusdem generis* is a 'rule of statutory construction * * * that where particular words of description are followed by general terms, the latter will be regarded as referring to things of a like class with those particularly described. It is invoked as an aid to statutory construction and is applicable when doubt arises as to whether a given article is to be placed in a class of which some individual subjects are named." 2 R. STURM, CUSTOMS LAW AND ADMINISTRATION § 51.10 at 49 (3rd ed. 1986); *see Izod Outerwear, Div. of General Mills, Inc.* v. *United States*, —— CIT ——, Slip Op. 85–72 (July 23, 1985).

ing in an interpretation contrary to that concern is subservient to the legislative intent. One such rule of statutory construction is known as *ejusdem generis.* It is "applicable whenever a doubt arises as to whether a given article not specifically named in the statute is to be placed in a class of which some of the individual subjects are named * * *." *United States* v. *Damrak Trading Co., Inc.,* 43 CCPA 77, 79, C.A.D. 611 (1956).

DRI, in its summary of argument, emphatically states:

> There is no dispute between the parties insofar as both agree that the validity of the Government's classification of the subject merchandise as "luggage" is *totally dependent upon* whether said merchandise is encompassed by the definition in the Tariff Schedules in schedule 7, part 1, subpart D, headnote 2(a)(ii), which, in part, provides that the article *must* be "designed to be carried with the person."

Plaintiff's Brief at 36 (emphasis added). This appears to be the key issue. But DRI appears to confuse the language of the statute in its continuing argument by relying on the primary design of the tool chest as the eclipsing and excluding factor that removes the tool chest from the 2 (a)(ii) category. Not to be overlooked are the five words that precede "designed to be carried with the person" and which words shed light on the issue at hand; these words are ", and like containers and cases * * *." The emphasis in this latter part of 2(a)(ii) is on the antecedents modified by the qualifying clause "designed to be carried with the person." With this confusion settled, it is appropriate to look at headnote 2(a)(ii).

The headnote at issue states:

> 2. For the purposes of the tariff schedules—
>
> (a) the term *"luggage"* covers—
>
> (i) travel goods, such as trunks, hand trunks, lockers, valises, satchels, suitcases, wardrobe cases, overnight bags, pullman bags, gladstone bags, traveling bags, knapsacks, kitbags, haversacks, duffle bags, and like articles designed to contain clothing or other personal effects during travel; and
>
> (ii) brief cases, portfolios, school bags, photographic equipment bags, golf bags, camera cases, binocular cases, gun cases, occupational luggage cases (physicians', sample, etc.), and like containers and cases designed to be carried with the person, except handbags as defined herein;

Schedule 7 at headnote 2(a).

This Court has held:

> [w]here there is an enumeration of specific words of description * * * followed by a general term * * * the rule of *ejusdem generis* aids in statutory interpretation * * *. Under the rule of *ejusdem generis,* which means "of the same kind", where an

> enumeration of specific things is followed by a general word or phrase, the general word or phrase is held to refer to things of the same kind as those specified.

Izod Outerwear, Slip Op. 85–72 at 11 (examples and citations omitted). For present purposes, this Court must establish the common characteristics found in "luggage" as enumerated in 2(a)(ii) and determine if the tool chests retain these qualities and confirm their classification under item 706.62, TSUS. *See id.* at 11–12.

Headnote 2(a) provides the definitional guidance for defining "luggage" as classified under item 706.62, TSUS, which Customs has determined is the proper classification of the tool chests. The exemplars listed in 2(a)(ii) represent a category of containers or cases which are designed to store, organize, and protect those contents from which the containers derive their name. Indeed, this Court has observed:

> The exemplars in subsection (i) are all articles customarily used for travel, * * *.
>
> The exemplars in subsection (ii) are containers or cases which are designed to hold specific items which give them their names: brief cases to hold papers, school bags to hold school articles, golf bags to hold golf equipment, gun cases to hold guns camera cases to hold cameras, etc.* * * The provision does not embrace all containers and cases designed to be carried with the person, but only those *ejusdem generis* with those enumerated.

Adoloco Trading Co. v. *United States,* 71 Cust. Ct. 145, 154, C.D. 4487 (1973).

This Court, in *Adolco,* clearly enunciated the exemplars listed in 2(a)(ii) represent a category of "containers or cases which are designed to hold specific items which give them their names." *Id.* In determining whether an item is embraced within a class, courts look to the enumerated articles to ascertain the characteristic which they possess in common, and if there is such, whether the article involved has this characteristic. *Kotake Co., Ltd.* v. *United States,* 58 Cust. Ct. 196, 199, C.D. 2934, 266 F. Supp. 385, 387–388 (1967).

After careful study of the listed items in 2(a)(ii), consideration of the doctrine of *ejusdem generis,* and close scrutiny of the tool chest in question, this Court finds the tool chest is properly classified "luggage" under item 706.62, TSUS, existing as "like containers and cases designed to be carried with the person * * *." akin to the exemplars listed in 2(a)(ii). The tool chest is designed to organize, store, and protect tools; the very items from which the chest derives its name. The tool chest is also "designed to be carried with the person" from place to place or job to job, around or outside the home. The tool chest may not be used by a tradesman to carry from place to place in his profession, but it is clearly contemplated the chest will be used by the average home handyman in a transportable

manner as his needs require. Although the *primary* design may not be tailored to this portable function, the portability is not the only factor in the classification of the tool chest. The question is not only one of portability but whether or not the item at issue does have characteristics in common with the enumerated articles. This Court holds that it does.

DRI has neither sustained its burden of proving Customs' classification is erroneous, *see* 28 U.S.C. § 2639(a)(i)(1986), nor convinced this Court its proposed alternative classifications are correct. The bulk of DRI's argument has gone to proving the primary design and function of the tool chest is for the purpose of organizing and protecting tools. DRI concedes "it can be said that the handle on the subject tool chest gives it the intrinsic capacity to be 'carried with the person;' however, as a matter of law, that in itself is not sufficient for classification as luggage." Plaintiff's brief at 46. This does not run counter to the language of 2(a)(ii): "and like containers and cases designed to be carried with the person."

Customs' classification has been scrutinized alone and in comparison with DRI's alternatives and the language of TSUS. The Customs Service was correct in its classification of the tool chest under item 706.62, TSUS, as "luggage" defined in headnote 2(a)(ii).

CONCLUSION

For the reasons stated, the complaint of plaintiff is dismissed, and the decision of the Customs Service and the assessment of duties thereunder is sustained.

Judgment will be entered accordingly.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED
				Item No. and ra
C87/12	Restani, J. January 27, 1987	A.N. Deringer Inc.	85–6–00748	Item 652.88 7.1%
C87/13	Restani, J. January 27, 1987	Viva Shoes Corp.	85–4–00606	Other footwear which is valued over $3.00 but n over $6.50 per p
C87/14	DiCarlo, J. January 27, 1987	Brooks Fashion Stores Inc.	85–12–01744	Other wearing apparel in Schedule 3, Part Subpart F TSUS specified on invoices
C87/15	DiCarlo, J. January 27, 1987	H. Bailey International, Ltd.	85–12–01743	Other wearing apparel in Schedule 3, Part Subpart F, TSUS as specified on invoices
C87/16	Aquilino, J. February 4, 1987	Paul Marshal Products, Inc.	85–8–01017	Item 386.04 28%
C87/17	Aquilino, J. February 4, 1987	Polarome Mfg. Co.	86–1–00127	Item 460.85 6¢ per lb. +5.8%

FICATION DECISIONS

	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
ate	Item No. and rate		
	Item 652.84 4%	Agreed statement of facts	Alexandria Bay Automotive springs
d at not pair	Item 700.56 6%	Agreed statement of facts	New York Footwear
rt 6, JS as	Item 376.56 12.1%	Izod Outerwear v. U.S. S.O. 85–72	New York Wearing apparel
rt 6, JS	Item 376.56 15%	Izod Outerwear v. U.S., S.O. 85–72	New York Wearing apparel
	Item 386.50 9.3%	Agreed statement of facts	Los Angeles Baskets with textile lining
%	Item A460.85 Free of duty	Agreed statement of facts	New York Artificial mixture of aromatic or odiferous substances

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U.S. Customs Service

Treasury Decisions

U.S. Court of Appeals for the Federal Circuit

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*U.S. G.P.O. 1987-181-118:40028